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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1990

IMMUNO, A.G.,

*Petitioner,*

vs.

JAN MOOR-JANKOWSKI,

*Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

## PETITION FOR A WRIT OF CERTIORARI

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## Questions Presented

1. May the New York Court of Appeals insulate itself from this Court's review by finding on remand, for the first time and for that announced purpose, an independent state constitutional ground for nonsuiting a libel plaintiff, when that question was not within the scope of the remand by this Court?

2. Is a libel plaintiff's burden of proving falsity so rooted in the First Amendment of the Federal Constitution that whether the burden has been met is a Federal question within this Court's jurisdiction, even though arising under a parallel provision of state constitutional law?

3. Under *Philadelphia Newspapers v. Hepps*, 475 U.S. 767, 106 S. Ct. 1558, 89 L. Ed. 2d 783 (1986), where there is evidence upon which a jury could find a published statement to be false, may a state court properly hold that it is required to determine the issue of truth or falsity before trial?

## Parties to the Proceeding

Petitioner is Immuno, AG,[1] a manufacturer of lifesaving vaccines and products derived from blood. Many of the products must, by law, be tested on chimpanzees.

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[1] *Parent:* Immuno International, AG. *Subsidiary:* Osterreichisches Institut fur Haemoderivate GmbH. *Affiliates:* Immuno Management AG, Immuno Trading AG, Tumbler Pruduktions AG, N.V. Immuno S.A., Immuno S.A., Immuno (Canada) Ltd., Immuno Danmark A/S, Immuno GmbH, Immuno France S.A.R.L., Immuno Ltd., Immuno S.p.A., Immuno AG (Zurich), Instituto de Hemoderivados Immuno S.A., Immuno Sweden AB, Immuno-U.S., Inc., Community Blood & Plasma Corp., Immuno Produtos Biologicos e Quimicos Ltda., Instituto de Herderivados Immuno de Venezuela S.A., Immuno B.V.

Respondent is Jan Moor-Jankowski, contract primatologist, competitor of Immuno for the limited supply of chimpanzees, and Editor in Chief of the *Journal of Medical Primatology*—a journal published, *inter alia*, to promote Moor-Jankowski's commercial interests as director of a primate laboratory dependent for its existence upon contracts with corporations like Immuno.

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(2) *The Court of Appeals has misconstrued and trivialized Milkovich.* . . . . . 17

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No.

# In the Supreme Court of the United States

October Term, 1990

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IMMUNO, A.G.,

Petitioner,

vs.

J. MOOR-JANKOWSKI,

Respondent.

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## PETITION FOR A WRIT OF CERTIORARI
## To the Court of Appeals
## for the State of New York

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### *Opinions Below*

The opinion of the Supreme Court of the State of New York, New York County, denying in relevant part defendant-respondent Moor-Jankowski's motion for summary judgment, is unreported (other than at 14 Med. L. Rptr. 1821 (S. Ct., N.Y. County 1987)), and is set forth in the Appendix at

A-45.[2] The decision of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, reversing the determination of the Supreme Court and dismissing the complaint, is set forth at A-59; that decision is reported at 145 A.D.2d 114, 537 N.Y.S.2d 129 (1st Dep't 1989).

The order of the Court of Appeals of New York granting plaintiff-petitioner Immuno, AG's application for leave to appeal is set forth at A-89, and is reported at 74 N.Y.2d 602, 541 N.Y.S.2d 985, 539 N.E.2d 1113 (1989). The decision of the Court of Appeals affirming the decision of the Appellate Division is set forth at A-35, and is reported at 74 N.Y.2d 548, 549 N.Y.S.2d 938, 549 N.E.2d 129 (1989). The order of the Court of Appeals denying Immuno's motion for reargument is set forth at A-90, and is reported at 75 N.Y.2d 866, 552 N.Y.S.2d 931, 552 N.E.2d 179 (1989). Despite extensive briefing, there was no written decision.

The order of this Court granting Immuno's petition for *certiorari*, vacating the decision of the New York Court of Appeals and remanding the case to that court for further consideration in light of *Milkovich v. Lorain Journal Co.*, 497 U.S. ___, 110 S. Ct. 2695, 111 L. Ed. 2d 1 (1990), is set forth at pp. A-91, A-92 and is reported at 497 U.S. ___, 110 S. Ct. 3266, 111 L. Ed. 2d 776 (1990). The decision of the New York Court of Appeals reaffirming its prior decision after *vacatur* by this Court is set forth at A-1, and is reported at 77 N.Y.2d 235, 566 N.Y.S.2d 906, 567 N.E.2d 1270, 59 U.S.L.W. 2459 (1991).

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[2]Appendix page references are in the form "A-47."

*Jurisdiction*

1. On January 15, 1991, the Court of Appeals of New York reaffirmed its prior decision granting Moor-Jankowski's motion for summary judgment. That constitutes the final order of the Court of Appeals of New York with respect to this case.

2. Jurisdiction to hear this writ of certiorari is conferred on this Court by 28 U.S.C. §1257(a) (1990).

*Constitutional and Statutory Provisions*

The First Amendment to the United States Constitution provides, in part:

> "Congress shall make no law. . .abridging the freedom of speech, or of the press. . . ."[3]

The Fourteenth Amendment to the United States Constitution provides, in part:

> "No State shall. . .deprive any person of life, liberty or property, without due process of law."

Title 28 U.S.C. §1257(a) provides:

> "Final judgments or decrees rendered by the highest

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[3] *Cf.* N.Y. CONST art 1, §8:

> "Every citizen may freely speak, write and publish his sentiments on all subjects, *being responsible for the abuse of that right*; and no law shall be passed to restrain or abridge the liberty of speech or of the press. . . ."

[Emphasis supplied.]

court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States."

## *Statement of the Case*

### *The Facts*

Moor-Jankowski is both the editor of the *Journal of Medical Primatology* and the director of LEMSIP, a primate laboratory which utilizes chimpanzees in biomedical research and testing for industry. Immuno manufactures lifesaving plasma derivatives and vaccines that, by law, are tested on chimpanzees for safety and efficacy. Having successfully conducted pre-clinical trials of an AIDS vaccine on chimpanzees pursuant to a cooperative research and development agreement (CRADA) among its U. S. affiliate and component institutes of the National Institutes of Health, Immuno is now in Phase I Clinical Trials, testing its AIDS vaccines in humans as part of its CRADA in the United States.

For years Immuno had contracted chimpanzee protocols to LEMSIP. Before the libel, Immuno grew dissatisfied with LEMSIP, and withdrew its protocols and its chimpanzees. Around the same time, Immuno started exploring the possibility of establishing a chimpanzee captive-breeding and testing facility in Sierra Leone. The basic libel revolves around statements accusing Immuno of having made a scientifically reckless and dangerous proposal to the Sierra

Leone government which had the potential to spread a deadly form of hepatitis in West Africa. The libelous implication was that it was impossible to tell whether a chimpanzee could spread Non-A, Non-B hepatitis and that Immuno proposed to release chimpanzees to the wild with no way of knowing they were safe.

Immuno made no such scientifically reckless and dangerous proposal. Nevertheless, the Court of Appeals dismissed. Not only did Moor-Jankowski then know how to tell whether chimpanzees exposed to Non-A, Non-B hepatitis were infectious (*see* A-133, A-134; *see also* A-127, A-128), but Moor-Jankowski also suggested to Immuno that it enter into the chimpanzee breeding project with Dr. Franz Sitter, a zoologist and parasitologist living in Sierra Leone.[4] Moor-Jankowski had years of first-hand experience with Dr. Sitter, having obtained more than 100 chimpanzees from him (*see* A-148) and knew he obtained chimpanzees without employing destructive methods.

After Immuno withdrew its chimpanzees from LEMSIP, Moor-Jankowski incited Shirley McGreal (whom he had called a "radical antivivisectionist," A-143),[5] to formally send a Letter to him as Editor (which in fact Moor-Jankowski partly wrote for her). *See* A-136 through A-140. The letter proclaimed, based on information that Moor-Jankowski gave to Shirley McGreal (A-137) that Immuno's Sierra Leone project would turn the chimpanzees of West Africa

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[4]Thus Moor-Jankowski initially recommended that Immuno engage in the project and he helped facilitate it (*see* A-155 through A-158). Then he deliberately defamed Immuno when it went forward with that project.

[5]She was not a medical doctor, but Moor-Jankowski bestowed such a degree upon her in the libelous material (A-152) to lend credibility to her libelous accusations. The Court of Appeals ignored this fact.

into a reservoir of hepatitis. The core premise was the factual statement that it was impossible to tell whether a chimpanzee which had been exposed to Non-A, Non-B hepatitis was infectious—which statement Moor-Jankowski conceded, in depositions, he knew to be false.[6] (*See* A-133; *see also* A-127, A-128, A-134.)

Moor-Jankowski printed that letter nearly a year after he came into possession of the first draft. He gave it the imprimatur of his own Editorial Note, vouching for it and for McGreal. In the interim, he deliberately ignored conflicting evidence which both he and McGreal must have recognized to be contrary to some of the letter's accusations, for that evidence consisted of official government documents which indicated that Immuno agreed with the Sierra Leone government not to try rehabilitating or releasing the chimpanzees (A-166) and to begin the operation with a smaller number of chimpanzees and commence breeding and testing simultaneously (A-161). It is now uncontested that these documents, written almost 9 months before publication of the libel letter, were in both McGreal's and Moor-Jankowski's possession. *See* A-159 through A-167; the Editorial Note and Letter to the Editor are reproduced at A-149.

Immuno did see an early version of the letter, and if

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[6]The minor premise of the accusation was that Immuno would release exposed chimpanzees into the wild, a fact Moor-Jankowski knew to be false prior to publication. The libel letter and an interview Moor-Jankowski gave to the *New Scientist* magazine (also a subject of this case) contained a host of other untrue and defamatory statements, which Immuno will develop on full brief if *certiorari* is granted. Perhaps the most damaging false charge was that Immuno would even *propose* a plān so inherently dangerous as to threaten West Africa with a chimpanzee-borne hepatitis epidemic. This point was made to the Court of Appeals on several occasions. *See* A-96, A-100-A-102 (second oral argument), A-117-A-118 (first oral argument). The opinion below studiously avoids dealing with this point.

Moor-Jankowski had heeded Immuno, none of this would have happened. Immuno told Moor-Jankowski the letter was wholly inaccurate, and told Moor-Jankowski (in his role as editor) to consult with himself (in his role as LEMSIP scientist) as to the letter's erroneous scientific premises, because Immuno knew Moor-Jankowski as a scientist *knew better* (A-168). Moor-Jankowski omitted that fact and others from the Editorial Note (A-149).

There is ample record evidence that, based upon his past conduct, Moor-Jankowski's motive was to discredit Immuno's plans to do its own testing (thus forcing Immuno to resume using his services at LEMSIP), and to keep McGreal and other animal rights activists from interfering with his own operation by focusing their attention on Immuno. *See* A-143 through A-147.

*The Proceedings*

On December 14, 1984 Immuno served its complaint for libel against Moor-Jankowski (and others no longer in the case) in the Supreme Court of New York, New York County. Moor-Jankowski moved for summary judgment on September 5, 1986. The court denied that motion by order entered August 17, 1987. *Immuno, A.G. v. Moor-Jankowski*, 14 Med. L. Rptr. 1821 (S. Ct., N.Y. County 1987). A-45.

Moor-Jankowski appealed that decision to the Appellate Division of the New York Supreme Court, First Department. That court reversed the motion court by order entered January 17, 1989, on the erroneous ground that the statements in question were either protected opinion or factually true. *Immuno, A.G. v. Moor-Jankowski*, 145 A.D.2d 114, 537 N.Y.S.2d 129 (1st Dep't 1989). A-59. Immuno then moved the Court of Appeals for permission to appeal. Permission was granted May 9, 1989. *Immuno, A.G. v.*

*Moor-Jankowski*, 74 N.Y.2d 602, 541 N.Y.S.2d 985, 539 N.E.2d 1113 (1989). A-89.

The Court of Appeals heard the first oral argument on November 14, 1989. In that argument, Moor-Jankowski's counsel *conceded* that the premise for Moor-Jankowski's core libel—that it could not be determined whether a chimpanzee exposed to Non-A, Non-B hepatitis was infectious—was a statement of fact. Moor-Jankowski had himself already conceded that it was false. *See* A-127, A-128 (statement of fact); A-127, A-133, A-134 (false). Nonetheless, without giving any sign of conducting an independent review, the Court of Appeals affirmed the Appellate Division's decision on December 14, 1989 by resolving the key issue of falsity in a manner contrary to Moor-Jankowski's own sworn testimony.

The Court of Appeals based its decision on the ground that the statements in question were (1) either protected opinion or factually true, and (2) immune from libel because they were made in a Letter to the Editor. *Immuno, A.G. v. Moor-Jankowski*, 74 N.Y.2d 548, 559, 549 N.Y.S.2d 938, 549 N.E.2d 129 (1989). A-35. Immuno sought reargument of that decision, but its motion was denied. *Immuno, A.G. v. Moor-Jankowski*, 75 N.Y.2d 866, 552 N.Y.S.2d 931, 552 N.E.2d 179 (1989). A-90.

On Immuno's petition for *certiorari*, this Court vacated the decision of the New York Court of Appeals and remanded the case to that court for further consideration in light of this Court's intervening decision in *Milkovich v. Lorain Journal Co.*, ___ U.S. ___, 110 S. Ct. 2695, 111 L. Ed. 2d 1 (1990). In *Milkovich* this Court was unanimous in the determination that the First Amendment did not call for artificial distinctions to be drawn between statements that can be labeled "opinion" and those that are labeled as fact; but rather that the implication of statements should be determined, and if they are capable of being proven false, they

are actionable.

The New York Court of Appeals heard the second oral argument on November 15, 1990, apparently believing that *Milkovich* was

> "just saying, look, don't apply this *Gertz* dictum with a heavy hand. Just don't apply it willy-nilly, but analyze each case."

A-98 (Hancock, J.). Except for a brief mention by Moor-Jankowski's counsel (A-109), the court showed no interest in the state constitution. However, the Court of Appeals did criticize this Court's reasoning in *Milkovich*. *See* A-7-A-8 (opinion below criticized this Court's analysis and application of First Amendment protection in *Milkovich*) and A-105 (*Milkovich* characterized as "difficult" during oral argument).

In spite of the fact that Judge Kaye explicitly recognized that the scope of the remand was to reconsider the case in light of *Milkovich* (A-4), her majority opinion was deliberately fashioned so as to escape the scrutiny of this Court's review of a decision rendered on its own remand. The majority went beyond the scope of this Court's mandate, expressly telling the parties that they should not even "consider another trip to Washington."[7] A-14.

Up to that moment, Art. I, §8 of the New York Constitution had been construed as parallel to the First Amendment of the U.S. Constitution in defamation cases. The New York Constitution had always been available as an affirmative defense before the Court of Appeals decision but it was largely ignored in civil libel suits until the remand, when the court below promoted it to "adequate and independent state

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[7]In his separate opinion, Judge Richard D. Simons characterized that ploy for what it was—"illegitimate." A-25.

grounds." Indeed, the Court of Appeals failed to find adequate and independent state grounds on its first consideration of this case. Instead, the first time this case was considered by the court below New York law followed the lead established by this Court and other Federal courts interpreting the First Amendment over the course of the last thirty years in light of *New York Times v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964), and its progeny.[8]

Charged with reconsidering in the light of *Milkovich*, however, the Court of Appeals has instead held, for the first time in a defamation case, that the New York and Federal constitutions are not parallel, but radically different.[9] New York constitutional law, it now appears, has suddenly and independently developed to incorporate what coincidentally turned out to be the same supposed Federal constitutional requirements that *Milkovich* had just discredited. But in holding that Moor-Jankowski's statements were protected opinion under the state constitution, the burden of proof the Court of Appeals misconstrued sprang from *Philadelphia Newspapers v. Hepps*, 475 U.S. 767, 106 S. Ct. 1558, 89 L. Ed. 2d 783 (1986); that is, it is Federal law that is crucially implicated in the decision. (This was acknowledged by the Court of Appeals. *See* n. 14, *infra*, and accompanying text.)

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[8]The Appellate Division said that *Philadelphia Newspapers v. Hepps*, 475 U.S. 767, 106 S. Ct. 1558, 89 L. Ed. 2d 783 (1986), set the applicable criteria but held that the plaintiff had failed to meet its constitutionally imposed burden to prove falsity. A-69-A-70.

[9]On the face of it, if the two provisions *are* different it is because the New York provision stresses the responsibility of individuals for abusing the right of free speech. *See* n. 3, *supra*. Instead of giving citizens the absolute right to speak without the fear of lawsuit, the New York Constitution appears to foresee the right to *bring* a defamation action and to protect it.

Immuno now petitions this Court for a writ of *certiorari* to definitively decide constitutional questions of increasingly broad importance:

1. May the New York Court of Appeals insulate itself from this Court's review by finding on remand, for the first time and for that announced purpose, an independent state constitutional ground for nonsuiting a libel plaintiff, when that question was not within the scope of the remand by this Court?

2. Is a libel plaintiff's burden of proving falsity so rooted in the First Amendment of the Federal Constitution that whether the burden has been met is a Federal question within this Court's jurisdiction, even though arising under a parallel provision of state constitutional law?

3. Under *Philadelphia Newspapers v. Hepps*, 475 U.S. 767, 106 S. Ct. 1558, 89 L. Ed. 2d 783 (1986), where there is evidence upon which a jury could find a published statement to be false, may a state court properly hold that it is required to determine the issue of truth or falsity before trial?

*Reasons for Granting Certiorari*

## I. By Disguising a Federal Determination as a State Constitutional Matter, the New York Court of Appeals Has Given This Court an Opportunity to Delineate Further the Relationship Between This Court and State Courts Described in *Michigan v. Long*.

### A. *This Court should exercise jurisdiction under 28 U.S.C. §1257(a) in this and other parallel-state-law cases.*

Ever since *New York Times v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964), the U.S. Supreme Court has set *national* policy in the development of defamation law. (This Court recently traced that history in *Milkovich v. Lorain Journal Co.*, 497 U.S. ___, 110 S. Ct. 2695, 11 L. Ed. 2d 1 (1990).)

The New York Court of Appeals has now pronounced itself dissatisfied with this Court's leadership. The theory seems to be that this Court cannot or will not provide the degree of protection New York media defendants seek in avoiding liability for inflicting reputational injury. These potential media defendants, in *amici* submissions to the court below, argued that reputational injury has little or no weight in the balance. The court below confirmed that view.[10]

In *Michigan v. Long*, 463 U.S.1032, 103 S. Ct. 3469, 77 L. Ed. 2d 789 (1974), this Court held that it had jurisdiction

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[10]The intellectual underpinnings of such a view smack of ideological opportunism: scholars of the same ideological bent saw a need for *unified* national policy when it was thought that state courts were by nature *more* restrictive of Bill of Rights freedoms. *See also* n. 17, *infra*.

to reverse a state court decision grounded in parallel state and federal provisions, provided that the decision

> "*fairly* appears to rest *primarily* on federal law, or to be *interwoven* with the federal law, and when the adequacy and independence of any possible state law ground is not clear. . . ."

463 U.S. at 1040 [emphasis supplied]. *Michigan v. Long* represented a step forward for interactive federalism.[11]

But the doctrine of *Michigan v. Long* can be misused by state courts as a talisman to ward off this Court's review. That is what the New York Court of Appeals tried to do. *Michigan v. Long*'s prescription of how state judges should write their opinions to immunize them from review can, as in this case, have a deleterious effect on significant federal interests, subordinating those interests to state political processes and the relationship of state judiciaries to their state polities. *See* Matasar & Bruch, *Procedural Common Law, Federal Jurisdictional Policy, and Abandonment of the Adequate and Independent State Grounds Doctrine*, 86 COL. L. REV. 1291, 1368-69 (1986).

Normatively, the next step after *Michigan v. Long* ought to be a holding that this Court has jurisdiction to review state court decisions which are *prima facie* grounded on state law, but which are to a certain degree interwoven with or derived from federal jurisprudence. *Michigan v. Long* itself means that this Court will no longer *presume* a state supreme court regarded its state grounds as adequate and independent. Generally, and especially in the instant case, the risk of this Court's providing an advisory opinion is offset by the service to state *and* federal law of this Court setting national

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[11] *See* Redish, *Supreme Court Review of State Court "Federal" Decisions: A Study in Interactive Federalism*, 19 GA. L. REV. 861 (1985).

standards straight in the very case that raised them.[12] This

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[12]New York decisions, as this case, affect much more than New York citizens. This case and its implications have been widely reported in general media throughout the country. *See, e.g. Top New York Court Protects Letters*, EDITOR & PUBLISHER, February 16, 1991; Strausbaugh, *Monkey Business: A Letter to the Editor Sparks a First Amendment Brawl*, New York Press, Vol. 4, No. 10, March 6-12, 1991; *The First Amendment And Rebels It Protects*, N.Y. Times, February 2, 1991; *Monkeying With Free Speech*, Metroland, January 24, 1991; Hollywood Reporter, Hollywood, California, January 18, 1991; *N.Y. Court Rules Letters to Editor Merit Libel Shield*, Arkansas Democrat, Little Rock, Ark., January 17, 1991; *New York High Court Finds Letters to the Editor Are Protected From Libel Suits*, Metropolitan News-Enterprise, Los Angeles, California, January 17, 1991; *Letters Protected From Libel Challenges*, Daily Journal, Los Angeles, California, January 17, 1991; *Ruling Made Letters to Editor Not Libel Grounds*, Reporter, Lebanon, Indiana, January 17, 1991; *Court Rules Letters to the Editor Deserve Protection From Libel Suits*, N.Y. Times, January 16, 1991; *Letter to the Editor Not Libelous, Court of Appeals Holds Opinion Exempt on Federal, State Grounds*, New York Law Journal, January 16, 1991; *Libel Suit Over Letter to Editor In Scientific Journal is Dismissed*, The Wall Street Journal, January 16, 1991; *Court: Letter to Editor Not Libelous*, Evening Sun, Norwich, N.Y., January 16, 1991; *Letter to Editor Wasn't Libelous: Court*, Finger Lakes Times, Geneva, N.Y., January 16, 1991; *Libel Lawsuit is Thrown Out*, Evening Observer, Dunkirk, N.Y., January 16, 1991; *Ruling Offers Protection on Letters to the Editor*, Buffalo News, Buffalo, N.Y., January 16, 1991; *Ruling Shields Those Writing Letters to the Editor*, Albany Times Union, Albany, N.Y., January 16, 1991; *Court Says Letter to Editor Wasn't Libelous*, Syracuse Herald Journal, Syracuse, N.Y., January 16, 1991; *Across the U.S.: Letter to Editor*, Albany Democrat-Herald, Albany, N.Y., January 16, 1991; *Ruling Protects Letters to Editors*, Grants Pass Daily Courier, Grants Pass, Oregon, January 16, 1991; *N.Y. Stands Ground on Libel Opinion*, Chicago Daily Law Bulletin, Chicago, Ill., January 16, 1991.

Similarly, the previous decision of the Court of Appeals was widely reported in the media. *See, e.g.*, Hentoff, *Keeping Letters to the Editor Out of Court*, Village Voice, February 20, 1990 at 22;

(continued...)

Court should not be denied a review of a state court decision which, at the specific direction of this Court, construed federal jurisprudence. *See* A-24 (Simons, J.).

B. *The New York Court of Appeals deliberately set out to insulate its misconstruction of Milkovich from this Court's review.*

(1) *The "independent adequate state ground" is a pure invention, because it is founded on this Court's decision in Hepps.*

The New York Court of Appeals seemed determined to protect its decision by denying Immuno an opportunity for review by this Court, glibly saying that Immuno should not consider "another trip to Washington" (A-14). It anticipated the direction of Supreme Court review from *Michigan v. Long*. It sought to avoid this Court's reaction to treating *Milkovich* as though it meant nothing more than "look, don't

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[12](...continued)
Hentoff, *A Very Expensive Letter to the Editor*, Village Voice, February 13, 1990, at 24; Hentoff, *'A Special Type of Expression—A Letter to the Editor'*, Washington Post, January 13, 1990; Green, *Suit Over Research Criticism Ended*, Charleston News & Courier, December 19, 1989; *High Court Bars Libel Suits Over Letters to the Editor*, Los Angeles Metropolitan News-Enterprise, December 15, 1989.

Indeed this case attracted international media attention well before the first Court of Appeals decision. *See* Redmond, *"Law of the Jungle,"* 4 BBC WILDLIFE 300 (June, 1986); *Decision Discourages 'Needless' Libel Suits*, FOLIO, MAGAZINE FOR MAGAZINE MANAGEMENT, June 1989, at 29; *"Chairman's Message,"* 3 ANIMAL LAW REPORT (Animal Protection Committee, Young Lawyers Division, American Bar Ass'n) April 1989; Hentoff, *The Quicksands of Libel*, Washington Post, April 1, 1989; Press Notes, *The Apes Have It*, N.Y. Times, February 14, 1989, at C24.

apply this *Gertz* dictum with a heavy hand. Just don't apply it willy-nilly, but analyze each case." A-98 (Hancock, J.).

So the Court of Appeals majority, over protests from within its own ranks that the ploy was "illegitimate" (A-25), found that Art. I, §8 of the New York Constitution included in *its* meaning exactly the erroneous notion of opinion's absolute protection that this Court rejected in *Milkovich*. And in effect it found that Immuno's burden of proving Moor-Jankowski's statements false, a burden originating with this Court's decision in *Hepps*, was not satisfied even by Moor-Jankowski's own sworn testimony that, at the very least, proved the falsity of the libel. (*See* A-133.) It is a holding that the law in New York is, as a matter of New York constitutional requirement, whatever the law was without *Milkovich* and that *Hepps* means the libel plaintiff's burden of proving falsity is apparently insurmountable even where the evidence from the defendant establishes the falsity.[13]

The Court of Appeals, like the Appellate Division whose analysis it adopted,[14] expressly acknowledged *Hepps* as the source in its discussion of the plaintiff's burden of proving falsity under *Milkovich* (A-8), and implicitly in its discussion of the parallel rule under state law:

> ". . .what plaintiff now characterizes as the 'core premise' of the IPPL letter both expressed and implied statements of fact that, *if shown to be false (which they*

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[13]Moor-Jankowski admitted that a test to determine infectiousness existed (A-133) but the Court of Appeals refused to believe that Immuno would actually implement the test, even after evidence (A-141) of Immuno's intentions was specified at the oral argument upon specific request of Judge Kaye (A-104, A-111).

[14]*Compare* Appellate Division analysis, A-69, with the Court of Appeals' adoption of that analysis on remand from this Court, A-4.

*were not), would be actionable".*

A-18 (emphasis supplied). It is ironic that the majority of the court below cited *Hepps* in the "federal" portion of its opinion, but *applied* it in its "state" analysis. It does show, however, what the court below implicitly refused to acknowledge: that a plaintiff's First Amendment burden of proving falsity under *Philadelphia Newspapers v. Hepps*, 475 U.S. 767, 106 S. Ct. 1558, 89 L. Ed. 2d 783 (1986), like actual malice, is part of defamation law everywhere.

It is for that very reason that a decision from this Court setting forth the burden of proof as to falsity at the summary judgment stage which as a *federal constitutional* matter the plaintiff must carry, will *not* be an advisory opinion. If this Court holds that Immuno has sufficiently shown falsity to go to trial, then it can reverse the Court of Appeals' finding on the basis on which that finding was made: this Court's own decision in *Hepps*.[15]

(2) *The Court of Appeals has misconstrued and trivialized Milkovich.*

It is hard to improve on what Judge Simons said in his concurring opinion (A-24):

> ". . .[i]f certain statements in the McGreal letter alleged to be defamatory may be actionable after *Milkovich* [as the majority hypothesized] the majority should identify them in its discussion of the federal claim and deny summary judgment. That is the request made of us by the Supreme Court: examine plaintiff's defamation claim in light of *Milkovich* and

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[15]This Court remanded so the Court of Appeals could apply *Milkovich*. Whether that court properly applied *Milkovich* in accordance with the remand should not be immunized from review.

determine if a cause of action is stated. The majority has failed to do so, however, hypothesizing that some unspecified statement may be actionable unless considered in context, under a broad State rule permitting such evaluation. Its grant of summary judgment on federal grounds, based on a narrow view of *Milkovich* in which context is not controlling, is inconsistent with the discussion on State law in which context becomes critical. It leaves both grounds for the decision suspect and seriously impairs the credibility of the Court's analysis."

C. *The Court of Appeals' misconstruction will work nationwide confusion, which this Court should prevent.*

(1) *Under today's circumstances, libel is rarely local, because the media reach everywhere.*

The Court of Appeals majority ignored the teaching of *Milkovich* as to the role of context. It held that one reason the *state* constitution protected the libel letter was *context*.[16]

The New York Court of Appeals may be one of the most influential of state courts. Others' understandings of *Milkovich* cannot be untainted by this treatment. Worse than merely fragmenting the law, the present decision could even start a judicial stampede away from the principles *Milkovich* was supposed to establish. The media defense bar has

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[16]The Court of Appeals also interwove the *Hepps* falsity burden into the New York constitution (A-18), and its fundamental error is its reading of *Hepps* to require the Court to ignore the defendant's own testimony that he knew how to tell whether a chimpanzee was infectious (*i.e.*, had the potential to spread Non-A, Non-B hepatitis). *See* A-133, A-134.

already argued in the press that the trend which it sought for the past thirty years, of federalizing the law of libel, should be reversed and, despite the Supreme Court's decision in *Milkovich*, that an opinion privilege ought *now*, for the first time, be separately found in state constitutions.[17] This

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[17]*See* Marcus and Green, *Libel Suit to Test Protection of Statements of Opinion*, Wall Street Journal, July 3, 1990, at B2, col. 3, in which Moor-Jankowski's former counsel is quoted as saying Article I, §8 protects opinion *per se*; *cf.* Reid, *New York State Case to Test 'Opinion' in Libel Suit*, Publishers Weekly, July 20, 1990, at 11, col. 2 (same counsel says statements in letter are opinion based on facts—presumably including "fact" of "no test"—disclosed).

The media themselves, as *amici curiae* (protecting their own self-interest), announced their intention to discover that in the absence of a federal constitutional basis for them to prevail, state constitutions should be expansively interpreted for even broader protection of speech and press rights than is provided under the First Amendment. Warren and Heinke, *Not As Bad As It Looks*, NAT'L L. J., July 30, 1990, Vol. 12, No. 47, p. 13 (authors previously filed brief for several media *amici* in *Milkovich*). *See also* n. 10, *supra*.

Moor-Jankowski's counsel on this appeal has also disparaged this Court's *Milkovich* decision in the press, claiming that the Court of Appeals decision was "the first step" toward its erosion. *See, Top N.Y. Court Protects Letters*, EDITOR & PUBLISHER, February 16, 1991. In his words:

> "Quite frankly, *Milkovich* is just bunk. [The decision was] poorly reasoned. The Court of Appeals was being charitable when they said *Milkovich* was ambiguous. It's a totally wrongheaded approach. It's not appropriately sensitive to the constitutional issues at stake.
>
> "Why are we going after the implications of the opinions [to determine if] there are triable issues of falsehood here? It's just ca-ca."

Strausbaugh, *Monkey Business*, New York Press, March 6-12, 1991, Vol. 4, No. 10, p. 20.

Court should grant *certiorari* once more in this case, announce its jurisdiction to review independent state grounds to the extent interwoven with federal law, and send this case directly to the trial judge for a trial.

(2) *Certiorari should be granted to give lower courts the guidance necessary to apply the Hepps burden of proof in the context of a pretrial motion.*

It is a rare libel indeed that has no jurisdictional contacts of any kind with any other state. Almost always, the plaintiff can pick from a number of possible jurisdictions. Potential defendants will only be forced to model their defensive conduct on the most restrictive jurisdiction. Much wasted legal effort will go into determining what jurisdiction that is, and what the rule is there. Thus there are good pragmatic as well as theoretical reasons for this Court to grant *certiorari* a second time in this case, and set the meaning of *Milkovich* straight. *Hepps* seems to have federalized the plaintiff's burden of proof in a libel case, and the content of such burden is a nationwide standard.

The issue then becomes what the *Hepps* burden of proof should be on a motion for summary judgment. In *Anderson v. Liberty Lobby*, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986), this Court held that the opponent of a motion for summary judgment on the issue of actual malice need only submit evidence from which a reasonable jury *might* return a verdict in his favor under that standard. *Liberty Lobby*, 477 U.S. at 257, 106 S.Ct. at 2514-15, 91 L. Ed. 2d at 217.

Although *Liberty Lobby* interpreted FRCP 56, it has been relied upon by many state courts deciding motions for summary disposition of actual malice cases under their own

state procedural rules.[18] If *Liberty Lobby* had been properly applied in this case summary judgment would have been denied, because Moor-Jankowski had himself testified that he knew that a test for infectiousness existed (a fact also noted by the Appellate Division (A-84) and the Court of Appeals (A-10)). A reasonable jury could have concluded that the Libel Letter's implication (that there was no way Immuno could tell whether a released chimpanzee could spread the disease) was false. The Court of Appeals chose to reject that argument, saying that there was no proof that Immuno would implement the test even though a representative had said that the chimpanzees would be in perfect condition for rehabilitation into the wild, that is, would not be infectious (A-111). Even though the members of a jury could find in Immuno's favor on the issue of falsity, the court below made sure that they would not have the opportunity.

The *Hepps* rule was enunciated after a trial. Since this Court first imposed the burden of proving falsity upon the plaintiff as a federal constitutional matter in *Hepps*, it now stands to reason that this Court should determine a plaintiff's burden of proving falsity on a motion for summary judgment. At the very least, the plaintiff's burden at this stage of the case should be clearly set forth by this Court upon grant of this petition. Most libel cases receive summary disposition whether they arise in state or federal court (McCrory, Bernius, Jones and Yu, *Constitutional Privilege in Libel Law*, 1 COMMUNICATIONS LAW 1990 (PLI), 7, 185 (summary judgment minimizes chilling effect by removing risk of jury resolution)). Although *Liberty Lobby* enunciated a rule regarding summary judgment procedures in general, a clear statement from this Court on the application of the *Hepps* burden before trial would be extremely beneficial. In this way, both state and federal courts will have a clear

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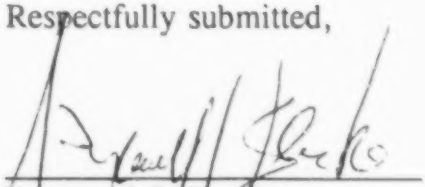
[18]*See, e.g.*, *Reed v. Northwestern Pub. Co.*, 124 Ill.2d 495, 530 N.E.2d 474 (1988); *Perez v. Scripps Howard Broadcasting*, 35 Ohio St. 3d 215, 532 N.E.2d 192 (1988).

guideline of the libel plaintiff's burdens in the context of a pretrial motion under controlling federal precedents. That will help them both to avoid the errors made by the court below, which appears to labor under the belief that there are no interests worth balancing against free speech.

*Conclusion*

Petitioner Immuno, AG therefore respectfully requests that this Court grant its petition to consider the important questions presented and to correct a serious injustice which has precluded it from having its defamation case heard on the merits.

Respectfully submitted,



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# Appendix

DECISION ON REMAND OF THE COURT OF APPEALS
OF NEW YORK
(January 15, 1991)

77 N.Y.2d 235, 566 N.Y.S.2d 906, 567 N.E.2d 1270,
59 U.S.L.W. 2459

State of New York
Court of Appeals

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1 No. 264
Immuno, A.G.,
Appellant,

OPINION

v.
J. Moor-Jankowski,
Respondent.

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Raymond S. Fersko, Anders R. Sterner, Mitchell Lapidus and Jonathan W. Lubell, NY City, for appellant.

Philip A. Byler and Louis Lauer, NY City, for respondent.

Henry R. Kaufman, NY City, for World Wildlife Fund, *et al.*; Arthur N. Eisenberg and Kenneth P. Norwick, NY City, for New York Civil Liberties Union; Laura M. Mattera, NY City, for Sierra Club, *et al.*; Floyd Abrams, NY City, for Adelphi University, *et al.*; *amici curiae*.

KAYE, J.

One year ago, applying what appeared to be settled law, we affirmed the dismissal of plaintiff's libel action against the editor of a scientific journal, essentially for his publication of a signed letter to the editor on a subject of public controversy. We concluded that there was no triable issue of fact as to the falsity of the threshold factual assertions of the letter, that—beyond those threshold factual assertions—the letter writer's statements of

opinion were entitled to the absolute protection of the State and Federal constitutional free speech guarantees, and that charges of defendant's deliberate incitement to have a defamatory letter published lacked factual foundation (*Immuno A.G. v Moor-Jankowski*, 74 NY2d 548).

On plaintiff's petition, the United States Supreme Court granted certiorari, vacated our judgment, and remanded the case for further consideration in light of *Milkovich v Lorain Journal Co.* (497 US ___, 110 S Ct 2695), decided June 21, 1990. For the reasons stated below, we adhere to our determination that defendant's summary judgment motion was properly granted and the complaint dismissed, premising our decision on independent State constitutional grounds as well as the Federal review directed by the Supreme Court.

I.

This libel action arises out of a letter to the editor published in the Journal of Medical Primatology in December 1983. The letter was written by Dr. Shirley McGreal as Chairwoman of the International Primate Protection League (IPPL), an organization known for its vigorous advocacy on behalf of primates, particularly those used for biomedical research. Defendant Dr. J. Moor-Jankowski, a professor of medical research at New York University School of Medicine and director of the Laboratory for Experimental Medicine and Surgery in Primates of the New York University Medical Center, is cofounder and editor of the Journal.

The subject of McGreal's letter (reprinted at 145 AD2d 118-120) was a plan by plaintiff, Immuno AG.—a multinational corporation based in Austria that manufactures biologic products derived from blood plasma—to establish a facility in Sierra Leone, West Africa, for hepatitis research using chimpanzees. Voicing the concerns of IPPL, McGreal's letter was critical of Immuno's proposal on a number of grounds: (1) that the motivation for the plan was presumably to avoid international policies or legal restrictions on the importation of chimpanzees, an endangered species; (2) that it could decimate the wild chimpanzee population, as capture of chimpanzees generally involved killing their mothers, and it was questionable whether experimental animals could be returned to the wild, as plaintiff proposed; and (3) that returning

the animals to the wild could well spread hepatitis to the rest of the chimpanzee population. McGreal stated that the current population of captive chimpanzees should be adequate to supply any legitimate requirements.

The letter was prefaced by an Editorial Note written by defendant that set out its background. Identifying McGreal as Chairwoman of IPPL, the Note stated that the Journal had received the initial version of the letter in January 1983 and had submitted it to plaintiff for comment or reply.[1] Plaintiff had acknowledged receipt of defendant's letter in February, offering no comment but that it was referring the matter to its New York lawyers. Thereafter, plaintiff's lawyers wrote that the statements were inaccurate, unfair and reckless, and requested the documents upon which the accusations were based, threatening legal action if the letter were printed before plaintiff had a meaningful opportunity to reply. The Editorial Note went on to state that the editors had advised plaintiff's attorneys that they should obtain the documentation directly from McGreal, and extended the period for plaintiff's reply by two months. The letter was published nearly a year after its receipt. In the meantime, articles had appeared in the Austrian press apparently confirming much of what McGreal had written, and defendant received no further word from plaintiff or its lawyers.

In addition to the letter that is the focus of contention, plaintiff complains that it was defamed by comments made by defendant quoted in an article entitled "Loophole May Allow Trade in African Chimps" that appeared in the New Scientist magazine shortly before McGreal's letter was published. Defendant is quoted as saying that the supply of captive chimpanzees was sufficient for research, describing plaintiff's attempts to circumvent controls on endangered species as "scientific imperial-

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[1]The letter defendant actually sent to plaintiff enclosed the McGreal letter, noting that "if the allegations in her letter can be proved to us to be incorrect we will return the letter to Dr. McGreal declining its publication." It further noted "past results of interventions" by McGreal regarding animal exportation and experimentation programs in India, Bangladesh and elsewhere, and that "[i]t is the policy of the Journal to allow all the concerned parties to take a position in a controversial matter."

ism," and warning that they will "backfire on people like me involved in the bona fide use of chimpanzees and other primate animals" for research.

In December 1984, plaintiff commenced this lawsuit against Moor-Jankowski and seven other defendants, including McGreal and the publishers and distributors of the New Scientist and the Journal of Medical Primatology, and it has since been vigorously litigated. By now, all the defendants except Moor-Jankowski have settled with plaintiff for what the motion court described as "substantial sums," and the complaint has been dismissed as to them. After extensive discovery—his own deposition conducted over 14 days—defendant moved for summary judgment. Supreme Court granted the motion to the extent of dismissing a claim for prima facie tort. It denied the motion as to the defamation claims, ruling that the statements at issue were statements of fact and, regardless of whether plaintiff was a public figure, there were triable issues of fact concerning whether defendant acted with actual malice in making or publishing the statements.

On defendant's appeal, the Appellate Division unanimously reversed Supreme Court's judgment (insofar as appealed from), granted defendant's motion, and dismissed the complaint (145 AD2d 114). The court held that all of the comments attributed to defendant in the New Scientist article were expressions of opinion that could not, as a matter of law, support an action for defamation. As to the McGreal letter, the Appellate Division held that for the most part it too was a constitutionally protected expression of opinion. To the extent there were (in the court's view) statements of a factual nature, the Appellate Division examined each statement meticulously, and concluded from the voluminous record that plaintiff had failed to adduce evidence of falsity. We now affirm, adopting without further elaboration our prior conclusion as to the lack of factual foundation for the deliberate incitement charges, and concentrating our analysis on the substance of the challenged statements.

II.

Our analysis first focuses on *Milkovich*, in compliance with the Supreme Court's direction on remand.

As the Supreme Court wrote, *Milkovich* leaves in place all previously existing Federal constitutional protections, including the "'"breathing space"'" which "'"freedoms of expression require in order to survive"'" (497 US, at —, 110 S Ct at 2706, *quoting Philadelphia Newspapers, Inc. v Hepps*, 475 US 767, 772), and specifically including immunity for statements of opinion relating to matters of public concern that do not contain a provably false factual connotation (497 US, at —, 110 S Ct at 2706; *Philadelphia Newspapers v Hepps, supra*). *Milkovich*, however, puts an end to the perception—as it turns out, misperception—traceable to dictum in *Gertz v Robert Welch, Inc.* (418 US 323, 339-340) that, in addition to all other Federal constitutional protections, there is a "wholesale defamation exemption for anything that might be labeled 'opinion.'" (497 US, at 110 S Ct at 2705, *supra.*)

Thus, statements of opinion relating to matters of public concern are today no less subject to constitutional protection, but speech earns no greater protection simply because it is labeled "opinion."

The key inquiry is whether challenged expression, however labeled by defendant, would reasonably appear to state or imply assertions of objective fact. In making this inquiry, courts cannot stop at literalism. The literal words of challenged statements do not entitle a media defendant to "opinion" immunity or a libel plaintiff to go forward with its action. In determining whether speech is actionable, courts must additionally consider the impression created by the words used as well as the general tenor of the expression, from the point of view of the reasonable person.

As often happens, a court's application of stated rules to the facts before it illuminates the rules. In this case the exercise is especially instructive.

The Supreme Court in *Milkovich* reversed the Ohio court's judgment—in substance reached in the companion case *Scott v News-Herald* (25 Ohio St 3d 243, 496 NE2d 699)—dismissing plaintiff's defamation complaint. The State court, applying the widely used four-part *Ollman* formula (*Ollman v Evans*, 750 F2d 970 [DC Cir], *cert denied* 471 US 1127 [*see especially*, Rehnquist, J., dissenting]) for separating immune opinion from actionable fact, had looked first to the article's specific words as

commonly understood, and second to whether the statements were verifiable, and it concluded that on both scores plaintiff would have stated a valid cause of action. The plain import of the challenged statements was that plaintiff had committed perjury, a verifiable fact.

But the Ohio court went on to dismiss the complaint because of the remaining two *Ollman* factors (the full context of the article in which the challenged statements appear, and the broader social context or setting surrounding the communication).[2] The court was persuaded from the language of the article and its context that the reasonable reader would recognize it as no more than the writer's opinion on a subject of public concern, and therefore constitutionally protected. "Examining the article in its larger context * * * the large caption 'TD Says' * * * would indicate to even the most gullible reader that the article was, in fact, opinion" (*Scott v News-Herald*, 25 Ohio St 3d at 252, 496 NE2d, at 707, *supra*) and, because the article appeared on the sports page—a "traditional haven for cajoling, invective, and hyperbole"—the challenged statements by the sports columnist likely would not have been read as charging the crime of perjury in judicial hearings (25 Ohio St 3d at 253-254, 496 NE2d, at 708).

The United States Supreme Court, looking at basically the same first two *Ollman* factors, determined that a reasonable fact finder could conclude that the challenged statements in *Milkovich* implied an assertion that petitioner had perjured himself in a judicial proceeding, and the connotation that petitioner had committed a felony was sufficiently factual to be susceptible of being proved true or false. Those were the same conclusions that had been reached by the Ohio court.

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[2]In Milkovich's action (Scott pursued a separate action on the same article), the Ohio Supreme Court—only shortly before *Ollman* was handed down—had actually reversed the summary judgment awarded to defendants, concluding that the statements in issue were factual assertions and not constitutionally protected opinion (*Milkovich v News-Herald*, 15 Ohio St 3d 292, 473 NE2d 1191, *cert denied* 474 US 953). Only after *Ollman* did the Ohio Supreme Court dismiss the complaints—Scott's as well as Milkovich's—as protected opinion. From the case chronology it is obvious that the Ohio court considered the latter two *Ollman* factors determinative.

The critical difference lay in the Supreme Court's treatment of the second two *Ollman* factors—the immediate and broader context of the article—reduced essentially to one: type of speech. Moreover, the Court made clear that by protected type of speech it had in mind the rhetorical hyperbole, vigorous epithets, and lusty and imaginative expression found in *Hustler Mag. v Falwell* (485 US 46 [ad parody]); *Letter Carriers v Austin* (418 US 264 [labor dispute]), and *Greenbelt Publ. Assn. v Bresler* (398 US 6 [heated real estate negotiation])—all instances where the Court had determined that the imprecise language and unusual setting would signal the reasonable observer that no actual facts were being conveyed about an individual.

In *Milkovich*, the Supreme Court resolved "type of speech" considerations in two sentences: "This is not the sort of loose, figurative or hyperbolic language which would negate the impression that the writer was seriously maintaining petitioner committed the crime of perjury. Nor does the general tenor of the article negate this impression." (*Milkovich v Lorain Journal Co.*, 497 US at —, 110 S Ct at 2707, *supra*). In this analysis, the Supreme Court said nothing of either the conjectural language of the disputed article, or the format of the piece—a signed editorial column appearing on the sports page. Both those considerations occupied the Ohio court and the dissent at length (*see, Milkovich v Lorain Journal Co., supra,* at —, 110 S Ct, at 2710-2713 [Brennan, J., dissenting]), ultimately persuading those Judges that no reasonable reader would have regarded the challenged assertions, *in their context*, as factual. The Supreme Court's failure to mention either point becomes particularly telling when its writing is laid against the State court opinion and Justice Brennan's dissent.

Thus, if not alone from the Supreme Court's statement of the governing rules, then from its application of those rules to the facts of *Milkovich*, it appears that the following balance has been struck between First Amendment protection for media defendants and protection for individual reputation: except for special situations of loose, figurative, hyperbolic language, statements that contain or imply assertions of provably false fact will likely be actionable.

We next apply *Milkovich* to the facts before us.

In general, as previously observed, it is hard to conceive that any published statement could be without some factual grounding. In particular, we recognized that the McGreal letter was provoked by a certain state of affairs, that it set out limited points of factual reference, and that to the extent that letter contained defamatory factual statements about plaintiff, they would be actionable if false (74 NY2d, at 559, *supra*).

Unlike the Supreme Court's characterization of the analysis done in *Scott v News-Herald*, we did not, and do not, hold that the assertions of verifiable fact in the McGreal letter were overridden or "trumped" by their immediate or broader context and therefore automatically and categorically protected as opinion. We did not, and do not, hold that all letters to the editor are absolutely immune from defamation actions, or that there is a wholesale exemption for anything that might be labeled "opinion."

But a libel plaintiff has the burden of showing the falsity of factual assertions (see, *Philadelphia Newspapers v Hepps*, 475 US 767, 776, *supra*; *Steinhilber v Alphonse*, 68 NY2d 283; *Silsdorf v Levine*, 59 NY2d 8, *cert denied* 464 US 831), and we concluded that plaintiff did not meet that burden. Given the thorough Appellate Division review of the factual assertions in issue, there hardly seemed a need for repetition of the charges and the relevant evidence. We noted simply that the factual review undertaken by the Appellate Division established that plaintiff had raised no triable issue as to the falsity of any of the threshold factual assertions of the McGreal letter (*Immuno AG. v Moor-Jankowski*, 74 NY2d 548, 559, *supra*).

We continue to believe that the Appellate Division review, to the extent it identified assertions of fact and concluded that such assertions had not been shown to be false, established that no triable issue of fact existed. While there still appears no need for us to restate those extensive findings, application of *Milkovich* to what plaintiff characterizes as the "core libel," or "core premise," or "core factual statement" of the IPPL letter illustrates the enduring soundness of that analysis.

According to plaintiff, the core premise of the letter is as follows: "Release of chimpanzee 'veterans' of hepatitis non-A, non-B research would be hazardous to wild populations, as there

is no way to determine that an animal is definitely not a carrier of the disease."

Applying *Milkovich*, we discern two assertions of fact, one express and one implied. First, the statement asserts that there is no scientific method for determining if a chimpanzee exposed to the non-A, non-B virus is not a carrier of the disease. Second, the statement implies that plaintiff will release possible carrier-chimpanzees who may endanger the wild population. Both assertions—the existence of a scientific test to determine carrier status, and plaintiff's plans—are verifiable. Finally, the "type of speech," unlike *Falwell*, *Letter Carriers* or *Greenbelt*, is restrained, the statements are seriously maintained, and they have an apparent basis in fact.

Though this core premise could be actionable, plaintiff's complaint was nonetheless properly dismissed because, on the record presented, it was apparent that plaintiff did not satisfy its burden of proving those statements false (*see*, 145 AD2d, at 139-141; *Philadelphia Newspapers v Hepps*, 475 US, at 767, *supra*; *Milkovich v Lorain Journal Co.*, 497 US, at —, 110 S Ct, at 2704, *supra*).

As for the express assertion of the absence of a test, plaintiff has pointed us to no proof establishing a scientific test in the relevant period that could conclusively determine the carrier state in chimpanzees or, more specifically, could definitely rule out that a veteran chimpanzee was not a carrier of the virus. When considered against the extensive record, plaintiff's effort to establish that there was a fail-proof test, by weaving together isolated fragments of the testimony of various experts (including defendant), simply does not satisfy its legal burden.

To the contrary, what is apparent from the record is that in the relevant period there was an ongoing process of discovery and debate centering on the very existence of a carrier state of the virus, all of which was made even more inconclusive by ambiguity as to precisely when relevant technology was acquired. When asked if it was possible that certain tests for detecting the carrier state would yield negative results even though the chimpanzee carried the virus, plaintiff's Dr. Johann Eibl replied "[t]here is no proof on that." Finally, even if the express assertion of the "core

premise" had been shown to be false, that assertion would not itself libel plaintiff, because it does not "'stat[e] actual facts' about [that] individual." (*Milkovich v Lorain Journal Co.*, 497 US at —, 110 S Ct, at 2706, *supra*; *see also*, *King Prods. v Douglas*, 742 F Supp 778, 784 [SDNY]).

Similarly, as the Appellate Division concluded, there was no proof of falsity of the implied assertion of fact—that plaintiff in the relevant period planned to release chimpanzees with no means of definitely determining that they were not carriers of the disease, thus endangering the wild populations. It is clear from the record that plaintiff, in 1983, was considering the option of rehabilitating chimpanzees used at the projected Sierra Leone facility, for return to a natural state (*see*, 145 AD2d, at 136). With no proof of the falsity of the express assertion that there was a conclusive test of carrier status available in 1983, it follows that there was also no proof of the falsity of the implied assertion that plaintiff planned to return its veteran test animals with no means of definitely determining that they were not hepatitis carriers.

As an additional matter, the Appellate Division considered infectiousness as well as carrier status (the "core premise" refers only to carriers [*see*, 145 AD2d, at 139]). Although there was testimony that infectiousness might be tested by inoculating a healthy chimpanzee with the blood of a potentially infected animal to see whether the healthy animal developed hepatitis symptoms, plaintiff produced no proof that it would in fact be implementing that procedure at its facility. That procedure was described by Dr. Alfred Prince, a leading expert, as "expensive," "laborious" and "wasteful," in that it involved the deliberate infection of healthy chimpanzees to test the infectiousness of animals that had been exposed to the virus. As the Appellate Division noted, "McGreal can hardly be faulted for not assuming that Immuno would necessarily perform the inoculation procedure on every one of the many chimps it intended to return to the wild." (145 AD2d, at 140.)

In sum, our "further consideration in light of *Milkovich*" (479 US —, 110 S Ct 2695, *supra*), using the core premise as illustrative, confirms our conclusion that, on this factual record, summary

judgment was properly granted to defendant.[3]

III.

We next proceed to a State law analysis, and also conclude on this separate and independent ground that the complaint was correctly dismissed.

A.

It has long been recognized that matters of free expression in books, movies and the arts generally, are particularly suited to resolution as a matter of State common law and State constitutional law, the Supreme Court under the Federal Constitution fixing only the minimum standards applicable throughout the Nation, and the State courts supplementing those standards to meet local needs and expectations (*see, e.g., People ex rel. Arcara v Cloud Books*, 68 NY2d 553, 557-558). Indeed, striking an appropriate balance "between the need for vigorous public discourse and the need to redress injury to citizens wrought by invidious or irresponsible speech" (*Milkovich v Lorain Journal Co.*, 497 US, at —, 110 S Ct at 2703, *supra*), is consistent with the traditional role of State courts in applying privileges, including the opinion privilege, which have their roots in the common law (*see, Immuno AG. v Moor-Jankowski*, 74 NY2d, at 555, *supra*; *Cole Fisher Rogow, Inc. v Carl Ally, Inc.*, 25 NY2d 943; *Julian v American Business Consultants*, 2 NY2d 1; *Hoeppner v Dunkirk Print Co.*, 254 NY 95, 99).

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[3]In this section of the opinion, we follow plaintiff's format, analyzing the "core premise" under *Milkovich*. Plaintiff additionally continues to press all of its prior defamation claims, and makes clear that its case is not limited to the core premise. While we believe that we have complied with the Supreme Court mandate by reviewing the express and implied factual assertions of the McGreal letter and New Scientist article as they were identified by the Appellate Division, it is impossible to state with complete certainty that some of the statements previously considered protected opinion, because of the language and format of the speech, would not now be viewed as implied assertions of fact. This may be an area of uncertainty left open by *Milkovich* (*see, The Supreme Court, 1989 Term—Leading Cases*, 104 Harv L Rev 219, 226-227 [1990]).

This State, a cultural center for the Nation, has long provided a hospitable climate for the free exchange of ideas (*Matter of Beach v Shanley*, 62 NY2d 241, 255-256 [Wachtler, J., concurring]). That tradition is embodied in the free speech guarantee of the New York State Constitution, beginning with the ringing declaration that "[e]very citizen may freely speak, write and publish * * * sentiments on all subjects." (NY Const, art 1, § 8.) Those words, unchanged since the adoption of the constitutional provision in 1821, reflect the deliberate choice of the New York State Constitutional Convention not to follow the language of the First Amendment, ratified 30 years earlier, but instead to set forth our basic democratic ideal of liberty of the press in strong affirmative terms (*see*, Forkosch, *Freedom of the Press: Croswell's Case*, 33 Fordham L Rev 415 [1965]).

"The expansive language of our State constitutional guarantee (*compare*, NY Const, art I, § 8, *with* US Const 1st Amend.), its formulation and adoption prior to the Supreme Court's application of the First Amendment to the States * * * the recognition in very early New York history of a constitutionally guaranteed liberty of the press * * * and the consistent tradition in this State of providing the broadest possible protection to 'the sensitive role of gathering and disseminating news of public events' * * * all call for particular vigilance by the courts of this State in safeguarding the free press against undue interference." (*O'Neill v Oakgrove Constr.*, 71 NY2d 521, 528-529.)

Thus, whether by the application of "interpretive" (*e.g.*, text, history) or "noninterpretive" (*e.g.*, tradition, policy) (*see, People v P. J. Video*, 68 NY2d 296, 302-303, *cert denied* 479 US 1091) factors, the "protection afforded by the guarantees of free press and speech in the New York Constitution is often broader than the minimum required by" the Federal Constitution (*O'Neill v Oakgrove Constr.*, 71 NY2d, at 529, n 3, *supra*).

Had defendant initially presented the issue as one of independent State constitutional law, instead of as an undenominated argument premised on the assumed identity of State and Federal law, it might have been resolved on that basis a year ago. The intervening occurrence of *Milkovich*, however, does not cause us to change our explicit conclusion that the case was correctly analyzed and decided in accordance with the core values protected

by the State Constitution (*see*, 74 NY2d, at 560, *supra; see also, People v Class*, 67 NY2d 431). Several considerations impel us to restate those conclusions separately now, underscoring that we decide this case on the basis of State law independently, and that in our State law analysis reference to Federal cases is for the purpose of guidance only, not because it compels the result we reach (*see, Michigan v Long*, 463 US 1032, 1038 n 4, 1041-1042).

First and foremost, we look to our State law because of the nature of the issue in controversy—liberty of the press—where this State has its own exceptional history and rich tradition (*see*, discussion, at 249, *supra*). While we look to the unique New York State constitutional text and history, our analysis also is informed by the common law of this State. It has long been our standard in defamation actions to read published articles in context to test their effect on the average reader, not to isolate particular phrases but to consider the publication as a whole (*see, e.g., James v Gannett Co.*, 40 NY2d 415, 419-420; *Julian v American Business Consultants*, 2 NY2d, 1, 14-15, *supra*).

Second, we are mindful not only of our role in the Federal system but also of our responsibility to settle the law of this State. As has been observed, *Milkovich* may leave an area of uncertainty for future litigation, with courts and authors in the interim lacking clear guidance regarding the opinion privilege; while all of the Supreme Court Justices agreed on the rule, they differed sharply as to how the rule should be applied. If we again assume the identity of State and Federal law, and assume that *Milkovich* has effected no change in the law, we perpetuate the uncertainty in our State law. Moreover, we are concerned that—if indeed "type of speech" is to be construed narrowly—insufficient protection may be accorded to central values protected by the law of this State. We would begin the analysis—just as we did previously in this case, and just as we did in *Steinhilber* (68 NY2d at 293, *supra*)—with the content of the whole communication, its tone and apparent purpose. That is a clear and familiar standard that in our view properly balances the interests involved. It has been consistently applied throughout the State for several years, following State common law and following *Steinhilber*.

Finally, the case comes to us in the posture of a summary

judgment motion, which searches the record and presents only issues of law. The State law issues have now been fully briefed, and there are no factual questions to be resolved. As the Supreme Court noted in *Milkovich*, the Ohio court remains free, on remand some 15 years after the challenged article, to address State law issues (497 US at___, 110 S Ct 2702 n 5, *supra*); were this case to be heard by the Supreme Court and reversed, that would be equally true on a further remand to this Court. In view of the costly,[4] sizeable record already amassed, including hundreds of pages of briefs, no purpose is served by compelling *these* parties, on *this* record and *these* briefs, to consider another trip to Washington, with the prospect that State law review before this Court would ultimately be available.

None of the concerns expressed in the Simons concurrence persuade us that the requested State law review should be deferred or denied.

*Any* independent State law activity in one sense can frustrate the pronouncement of Federal law. In another sense, however, state constitutional law review—which is a responsibility of state courts and a strength of our Federal system—advances the process of pronouncing Federal law; a state can act as a "laboratory" in more ways than one, as indeed justice Brandeis recognized in *New State Ice Co. v Liebmann* in his reference to state statutes (285 US 262, 311 [dissenting]; *see also*, *Batson v Kentucky* 476 US 79, *especially* p 82, n 1). By the same token, Federal cases, including Supreme Court cases—even *Milkovich* itself—can act as a source of guidance for state courts in formulating state law, even though interpretation of those cases in state law decisions reached on adequate and independent state grounds will be unreviewable by the Supreme Court (see, *Michigan v Long*, 463 US at 1041, *supra*).

In analyzing cases under the State Constitution, this Court has not wedded itself to any single methodology, recognizing that the proper approach may vary with the circumstances (*see, e.g.*,

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[4]The affidavit of one of the original parties, dated September 3, 1986, indicates that the insurance company settled with plaintiff over her protest when legal costs exceeded several hundred thousand dollars.

*Rivers v Katz*, 67 NY2d 485 [primacy method]; *People v Stith*, 69 NY2d 313, 316 n 7 [dual method]; *People ex rel. Arcara v Cloud Books, Inc.*, 68 NY2d 553 *supra* [interstitial method]). Several times recently we have pointedly rested our decisions on both Federal and independent State constitutional grounds (*see, e.g., O'Neill v Oakgrove Construction, Inc.*, 71 NY2d at 528, *supra; People v Stith, supra*).

That analysis is particularly appropriate here because of the unusual procedural posture of the case. The Supreme Court has specifically directed us to consider the case in light of *Milkovich*, and we comply with that direction, as courts throughout the nation have done in similar circumstances (*see, e.g. People v Duncan*, 124 Ill2d 400, 530 NE2d 423[1988]). But that does not compel us to ignore our prior decision or the arguments fully presented on remand that provide an alternative basis for resolving the case (*see*, Hellman, *Granted, Vacated, and Remanded—Shedding Light on a Dark Corner of Supreme Court Practice*, 67 Judicature 389, 394-395 [1984]).[5] Turning our back on the now developed, controlling State law issues would be no service to the Supreme Court, or the litigants, or the law of this State.

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[5]As Professor Hellman indicates in this and his fuller treatment of the subject of Supreme Court orders of "grant, vacate and remand" (the GVR) (*see*, Hellman, *The Supreme Court's Second Thoughts: Remand for Reconsideration and Denials of Review in Cases Held for Plenary Decisions*, 11 Hastings Const LQ 5 [1983]), the GVR remains a mystery to most of the legal profession (*id.*, at 5-6). Of 90 cases he studied in which there was at least a surface inconsistency between the vacated judgment and the cited decision, the lower court in more than 60 adhered to its original ruling, reviewing the Supreme Court decision but upholding its own earlier judgment on some other ground (67 Judicature, at 394-395). There is no basis for the declaration that the Supreme Court here was "indicating its desire to pass on the issues of Federal law and, as a matter of comity, remitted the case to us before ruling so that we might reconsider it in light of the intervening *Milkovich* decision." (Simons, J., concurrence, at 262.) Moreover, the word "illegitimate" is taken wholly out of context from Bice, *Anderson and the Adequate State Ground*, 45 S Cal L Rev 750 1972) (concurrence, at 261). Indeed, the author of that article makes clear that foreclosing dual constitutional analysis in all circumstances "would prevent the legitimate efficiency gains that fully deciding the state and federal claims often can provide." (*Id.*, at 758.)

We therefore proceed to resolve this case independently as a matter of State law, concluding that—as we previously held in *Immuno*—the standard articulated and applied in *Steinhilber* furnishes the operative standard in this State for separating actionable fact from protected opinion.

B.

Letters to the editor, unlike ordinary reporting, are not published on the authority of the newspaper or journal. In this case, for instance, defendant's prefatory Editorial Note signaled that the letter was to be given only the weight its readers chose to accord McGreal's views; such reservations may be generally understood even when letters are not accompanied by any editorial note. Thus, any damage to reputation done by a letter to the editor generally depends on its inherent persuasiveness and the credibility of the writer, not on the belief that it is true because it appears in a particular publication.

Significantly, for many members of the public, a letter to the editor may be the only available opportunity to air concerns about issues affecting them. A citizen troubled by things going wrong "should be free to 'write to the newspaper': and the newspaper should be free to publish [the] letter. It is often the only way to get things put right." (*Slim v Daily Tel.* [1968] 1 All ER 497, 503, quoted in *Pollnow v Poughkeepsie Newspapers*, 107 AD2d 10, 16 [Titone, J.], *affd on other grounds* 67 NY2d 778.) The availability of such a forum is important not only because it allows persons or groups with views on a subject of public interest to reach and persuade the broader community but also because it allows the readership to learn about grievances, both from the original writers and from those who respond, that perhaps had previously circulated only as rumor; such a forum can advance an issue beyond invective. Finally, at the least, the public may learn something, for better or worse, about the person or group that wrote such a letter (*see*, Franklin, *Libel and Letters to the Editor: Toward an Open Forum*, 57 U Colo L Rev 651, 663-664 [1986]). Thus, in determining how the average person would view McGreal's letter, we take into account that it is a letter to the editor and that "[t]he common expectation of a letter to the editor is not that it will serve as a vehicle for the rigorous and compre-

hensive presentation of factual matter but as one principally for the expression of individual opinion." (145 AD2d, at 129.)

Passing from the broader social setting to the immediate context of the letter, we note that the common expectation regarding letters to the editor has particular pertinence here.

As the Appellate Division observed, the Journal of Medical Primatology is directed to a highly specialized group of readers—medical doctors, researchers and the medical and science libraries of academic institutions. The average reader is thus likely not a novice in the field of medical primatology, but brings "a well-developed understanding of the issues facing biomedical researches using primates as research subjects." (145 AD2d, at 129.) The prefatory Note additionally called particular attention to the circumstances surrounding the letter, pointing up that this was McGreal's view, and that plaintiff's attorneys considered her statements to be "wholly inaccurate and reckless" and "not a fair comment" on plaintiff's proposed project.

The letter itself related to a public controversy regarding use of live animals belonging to endangered species, including chimpanzees, in animal experimentation and research. McGreal (a known animal rights activist) and IPPL (whose very name broadcasts its point of view) were fully identified to readers of the letter. The letter made clear that its purpose was to voice the conservationist concerns of this partisan group in order "to draw this situation to the attention of interested parties." Thus, like the broader social setting of McGreal's letter, the immediate context of the letter, together with the prefatory Note, would induce the average reader of this Journal to look upon the communication as an expression of opinion rather than a statement of fact, even though the language was serious and restrained.

Given the purpose of court review—to determine whether the reasonable reader would have believed that the challenged statements were conveying facts about the libel plaintiff—we believe that an analysis that begins by looking at the content of the whole communication, its tone and apparent purpose (*Steinhilber v Alphonse*, 68 NY2d, at 293, *supra*) better balances the values at stake than an analysis that first examines the challenged statements for express and implied factual assertions, and finds them action-

able unless couched in loose, figurative or hyperbolic language in charged circumstances (*see generally*, Note, *Fact and Opinion in Defamation: Recognizing the Formative Power of Context*, 58 Fordham L Rev 761 [1990]). A media defendant surely has no license to misportray facts; false statements are actionable when they would be perceived as factual by the reasonable person. But statements must first be viewed in their context in order for courts to determine whether a reasonable person would view them as expressing or implying *any* facts.

The difference is more than theoretical. In the present case, for example, we conclude that what plaintiff now characterizes as the "core premise" of the IPPL letter both expressed and implied statements of fact that, if shown to be false (which they were not), would be actionable. That is true as well of other factual reference points considered by the Appellate Division and held to be lacking in demonstrated falsity. Our State law analysis of the remainder of the letter, however, would not involve the fine parsing of its length and breadth that might now be required under Federal law for speech that is not loose, figurative or hyperbolic (*see, e.g., Unelko Corp. v Rooney*, 912 F2d 1049 [9th Cir]). Isolating challenged speech and first extracting its express and implied factual statements, without knowing the full context in which they were uttered, indeed may result in identifying many more implied factual assertions than would a reasonable person encountering that expression in context.

We conclude that the body of the letter in issue communicated the accusations of a group committed to the protection of primates, and that the writer's presumptions and predictions as to what "appeared to be" or "might well be" or "could well happen" or "should be" would not have been viewed by the average reader of the Journal as conveying actual facts about plaintiff. It may well be, for example, that McGreal's statements regarding plaintiff's motivations—if studied long enough in isolation—could be found to contain implied factual assertions, but viewed as IPPL's letter to the editor, it would be plain to the reasonable reader of this scientific publication that McGreal was voicing no more than a highly partisan point of view.

Thus, we conclude that an approach that takes into account the full context of challenged speech, as previously set forth in

*Immuno* and *Steinhilber*, accords with the central value of assuring "full and vigorous exposition and expression of opinion on matters of public interest." (*Rinaldi v Holt, Rinehart & Winston*, 42 NY2d 369, 384, *cert denied* 434 US 969.)

The public forum function of letters to the editor is closely related in spirit to the "marketplace of ideas" and oversight and informational values that compelled recognition of the privileges of fair comment, fair report and the immunity accorded expression of opinion. These values are best effectuated by according defendant some latitude to publish a letter to the editor on a matter of legitimate public concern—the letter's author, affiliation, bias and premises fully disclosed, rebuttal openly invited—free of defamation litigation. A publication that provides a forum for such statements on controversial matters is not acting in a fashion "at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected" (*Garrison v Louisiana*, 379 US 64, 75), but to the contrary is fostering those very values.

Finally, we reaffirm our regard for the particular value of summary judgment, where appropriate, in libel cases (*see, Karaduman v Newsday, Inc.*, 51 NY2d 531, 545). Indeed, this is an additional ground for preferring the independent State law approach to one that might make summary disposition less likely (*see, Milkovich v Lorain Journal Co.* 497 US at , 110 S Ct at 2698, *supra; see also, Florida Med. Center v New York Post Co.*, 568 So2d 454 [Fla Dist Ct App]). The chilling effect of protracted litigation can be especially severe for scholarly journals, such as defendant's, whose editors will likely have more than a passing familiarity with the subject matter of the specialized materials they publish. If required as to every line of a reader's expressed viewpoint to meet the standard of *Chapadeau v Utica Observer-Dispatch*, (38 NY2d 196), they may as a practical matter have little alternative to lengthy litigation or substantial settlement. In such instances, hypertechnical parsing of a possible "fact" from its plain context of "opinion" loses sight of the objective of the entire exercise, which is to assure that—with due regard for the protection of individual reputation—the cherished constitutional guaran-

tee of free speech is preserved.[6]

Accordingly, upon reargument, following remand by the Supreme Court of the United States, we again conclude that the order of the Appellate Division should be affirmed, with costs.

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[6]A few words are in order about the various concurrences. All of the concurrers joined unanimously in the first *Immuno* opinion (which invoked both the State and Federal constitutions as the basis for decision), they joined unanimously in the *Steinhilber* analysis beginning with the content of the whole communication, its tone and apparent purpose (68 NY2d 283, 293), and they all now join unanimously in awarding summary judgment to defendant.

Judge Simons would affirm on Federal constitutional grounds alone, deferring the State constitutional issues that have been fully briefed and argued for a further remand by the United States Supreme Court. Judge Hancock also would affirm on Federal constitutional grounds alone. Unlike Judge Simons, however, he does not view dual constitutional analysis as "illegitimate" (*see, e.g., People v Cintron*, 75 NY2d 249, 259 [Hancock, Jr., J.]; *People v Dietze*, 75 NY2d 47, 50, n 1 [Hancock, Jr., J.]; *Seawall Assocs. v City of New York*, 74 NY2d 92, 115-116 [Hancock, Jr., J.]; *O'Neill v Oakgrove Constr.*, 71 NY2d 521, 528-529 [Hancock, Jr., J.]; *People v Stith*, 69 NY2d 313, 316, n [Hancock, Jr., J.]). Judge Titone agrees (Titone, J., concurrence, at 263-264).

Because the Federal analysis is conclusive, Judges Simons and Hancock would decide this case on Federal law alone. Because the Federal analysis is inconclusive, Judge Titone would decide this case on State law alone. Judge Titone, however, would not decide the case on the basis of State constitutional law, as briefed and argued by the parties. Although he would reach "essentially the same conclusion that the majority has reached" (Titone, J., concurrence, at 266), he would do so on the basis of State *common* law. Apart from the fact that defendant has not tendered his argument on this basis, the first *Immuno* opinion was expressly premised on State and Federal constitutional grounds. Even on a clean slate, this Court has not previously wedded itself to the primacy methodology (Titone, J. concurrence, at 264-265), nor have we hesitated to recognize a constitutional right with its source in the common law (*see, e.g., Rivers v Katz*, 67 NY2d 485).

Among the possible approaches to the single result we all agree is correct—the concurrers have now put the full range of alternatives before the public—we continue to believe that the majority's choice best serves all of the interests at stake.

SIMONS, J. (concurring).

This case is before us on remand from the Supreme Court of the United States for reconsideration in view of its intervening decision in *Milkovich v Lorain Journal Co.* (497 US —, 111 L Ed 2d 1). After reconsideration, the majority has affirmed an order granting summary judgment to defendant. I agree with it that judgment was properly awarded on Federal grounds. In reconsidering the case, however, the majority has rendered an interpretation of *Milkovich* which is narrower than necessary to resolve the matter before us and one which appears, from statements in the *Milkovich* opinions, to be far more constricted than the Supreme Court intended. My purpose in writing is not to resolve these differences over the scope of the protection afforded by *Milkovich*. Only the Supreme Court can do that. My concern is that the Supreme Court will not have the opportunity to do so in this case because the majority has foreclosed review by also resting its decision on independent State grounds (*see, Michigan v Long*, 463 US 1032). I do not agree with the procedure followed, particularly in the circumstances of this case, and I find the majority's reasoning supporting the two theories inconsistent. Accordingly, I cannot join in the opinion of the Court.

*I*

In pre-*Milkovich* decisions, the Federal and State courts had generally concluded that statements of opinion were protected from libel actions by the First Amendment. These holdings were based in large part on the statement of Justice Powell that "[u]nder the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas" (*Gertz v Robert Welch, Inc.*, 418 US 323, 339-340.) Despite the sweep of that language, State and lower Federal courts recognized that *Gertz* had not created a blanket exemption for defamatory words merely because they were labeled as "opinion" (*see, Steinhilber v Alphonse*, 68 NY2d 283, 289-292; *Cianci v New Times Publ. Co.*, 639 F2d 54, 61, quoted in *Milkovich v Lorain Journal Co.*, 497 US at —, 111 L Ed 2d, at 17). False factual accusations could easily be couched in the language of opinion. Thus, the courts quickly devised methods of distinguishing actionable statements of fact from nonactionable statements of

opinion. The test was divided into various methods of determining whether the statements conveyed a precise meaning which could be characterized as true or false and, if the words were ambiguous, by resolving the ambiguity after an examination on the context in which the statements appeared (*see, Ollman v Evans*, 750 F2d 970, 976, *cert denied* 471 US 1127; *Steinhilber v Alphonse*, 68 NY2d 283, 292, *supra*).

The Supreme Court addressed the issue directly for the first time in *Milkovich*, holding that there is no separate constitutional privilege for statements that might be labeled "opinion". The Court recognized that statements on matters of public concern must be provable as false before they are actionable and that requires a determination of whether they are matters of opinion or fact. Matters of public concern which do not contain a "provably false factual connotation" receive full constitutional protection (*id.*, 497 US, at —, 111 LEd 2d, at 18). Next, the Court recognized protection for statements that cannot "reasonably [be] interpreted as stating actual facts" about an individual (*Hustler Mag. v. Falwell*, 485 US 46, 50). Avoiding literal definitions, the Court stated that prior case law required an examination of the "circumstances" in which the statement was made (*Milkovich v Lorain Journal Co., supra*, at —, at 16; *see, Hustler Mag. v Falwell, supra; Greenbelt Publ. Assn., Inc. v Bressler*, 398 US 6, 13; *Letter Carriers v Austin*, 418 US 264, 284-286). This "assur[es] that public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical hyperbole' which has traditionally added much to the discourse of our Nation" (*Milkovich v Lorain Journal Co.*, 497 US, at —, 111 L Ed 2d, at 19).

It can be argued that the *Milkovich* decision did not change the law of defamation as it was previously applied by State and lower Federal courts. Justice Brennan did not believe it had and it is notable that the majority did not take exception to his observation that the Court had merely restated the law "lower courts have been relying on for the past decade" (*see, Milkovich v Lorain Journal Co., supra*, at —, at 21 [Brennan, J., dissenting]). His view is shared by others (*see, e.g., The Supreme Court, 1989 Term—Leading Cases*, 104 Harv L Rev 219, 223). Justice Brennan's disagreement with the result was based simply upon the application of the rule, i.e., what a "reasonable reader" would

have understood the statements in *Milkovich* to mean. The majority believed that the challenged statements could be interpreted as either stating or implying defamatory facts; Justices Brennan and Marshall believed that they could not.

*II*

The majority holds in the first part of its opinion, considering plaintiff's claim under the Federal Constitution, that summary judgment was properly granted to defendant. It then asserts that *Milkovich* creates "uncertainty" as to whether the "context" of a statement may be considered and interprets *Milkovich* as stating a rule which protects opinion only in "special situations" involving "loose, figurative, hyperbolic language" (majority opn, p 245). Thus, after resolving plaintiff's claim under the Federal Constitution, the majority reopens the issue with its interpretation as justification for its additional ruling on State constitutional grounds recognizing a greater importance for context.

Context is not controlling in this case, however, under either the majority's narrow view of *Milkovich* or our State rules. The Appellate Division, in a unanimous 27-page analysis of plaintiff's claims stated that, for the most part, the McGreal letter was a constitutionally protected expression of opinion. To the extent the court identified unambiguous assertions of fact, it found that they had not been proven false—or indeed were demonstrably true—and therefore ruled that plaintiff failed to meet its burden of proof (*see, Philadelphia Newspapers v Hepps*, 475 US 767, 776). We accepted its conclusion when the case was first before us and the majority again accepts it for the purpose of deciding the Federal question (*see*, majority opn, at 245-246, 248, n 3).[1] Thus, plaintiff's claims fail regardless of the "circumstances" or

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[1]For some reason, the majority believes its obligation to examine plaintiff's Federal claim is limited to reviewing the "express and implied factual assertions * * * as they were identified by the Appellate Division" (majority opn, at 248, n 3). On a motion for summary judgment, however, the Court is required to pass on the defamatory nature of all the statements alleged to be actionable. Although the majority appears to believe the Appellate Division did not perform this function, it explicitly stated that it had done so (see, 145 AD2d 114, 143 ["of the many statements cited by the plaintiff * * * there was not one that was actionable"]).

"context" in which the alleged defamatory words appear.

Nevertheless, the majority proceeds to examine the context of the statements under the State Constitution because a different conclusion could conceivably emerge under *Milkovich* (majority opn, at 248, n 3). If certain statements in the McGreal letter alleged to be defamatory may be actionable after *Milkovich* the majority should identify them in its discussion of the Federal claim and deny summary judgment. That is the request made of us by the Supreme Court: examine plaintiff's defamation claim in light of *Milkovich* and determine if a cause of action is stated. The majority has failed to do so, however, hypothesizing that some unspecified statement may be actionable unless considered in context under a broad State rule permitting such evaluation. Its grant of summary judgment on Federal grounds, based on a narrow view of *Milkovich* in which context is not controlling, is inconsistent with the discussion on State law in which context becomes critical. It leaves both grounds for the decision suspect and seriously impairs the credibility of the Court's analysis.

*III*

Aside from these considerations, there are several institutional concerns which should be addressed.

This Court, as the highest court in the State, is primarily concerned with the institutional function of declaring and applying constitutional and common-law principles, authoritatively interpreting statutes and formulating policy on issues of State-wide concern. When the Court reviews a question of Federal constitutional law, however, it acts as part of a larger judicial system embracing not only New York but the Nation as a whole. When Federal questions are presented, its institutional functions are subordinated to the Supreme Court and it acts, in effect, as an intermediate court. Notwithstanding this different role, it is important that State courts participate in the Nation's court structure. They have much to contribute to the Supreme Court's determination of Federal law by addressing the issues thoroughly and persuasively and providing local perspectives for the development of constitutional rules (*see, Johnson v Louisiana*, 406 US 356, 376; *New State Ice Co. v Liebmann*, 285 US 262, 311 [Brandeis, J., dissenting]). Inasmuch as the Supreme Court is

charged with the ultimate responsibility for pronouncing Federal law, however, it should be given the opportunity to accept, modify or reject a State court's determination of what the Federal Constitution requires.

Our unnecessary reliance on State law in this case frustrates that process. Under general principles, Supreme Court jurisdiction to review a Federal question fails if the decision of the State court is also based on adequate and independent State grounds (*see, Michigan v Long*, 463 US, *supra*, at 1038 n. 4, 1041-1042; *Fox Film Corp. v Muller*, 296 US 207, 210; *cf., Delaware v Prouse*, 440 US 648, 651-653; *and see, Ohio v Johnson*, 467 US 493, 499; Comment, *Ohio v Johnson, The Continuing Demise of the Adequate and Independent State Ground Rule*, 57 U Colo L Rev 395, 416). The Supreme Court will not review the matter because it can no longer control the litigation; its decision would constitute merely an advisory opinion. The State court's pronouncements on Federal law, correct or not, thus become judicial dictum because they are not the dispositive reasons for the Court's decision.

Resting the decision on dual grounds also violates established rules of judicial restraint. Traditional doctrine holds that a court should decide no more than necessary to resolve the dispute before it. Constitutional questions should be avoided if possible (*see, Communist Party v Catherwood*, 367 US 389, 392; *People v Felix*, 58 NY2d 156, 161; *Matter of Beach v Shanley*, 62 NY2d 241, 254). The practice of deciding a case on dual grounds, thereby insulating the Federal question from Supreme Court review has been described as "illegitimate" (*see*, Bice, *Anderson and the Adequate State Ground*, 45 S Cal L Rev 750, 757; Collins, *The Once "New Judicial Federalism" and Its Critics*, 64 Wash L Rev 5, 7 [quoting Bice and criticisms of the California Supreme Court's practice of dualism by various public officials]). It is said to be not only contrary to the general rules underlying judicial restraint but also a perversion of the "new federalism", pushing State constitutional power beyond its proper limits by purporting to state Federal law, but insulating the analysis from review by the Supreme Court. The inevitable consequence of dual reliance is that the Supreme Court, charged with ultimate authority in the area, loses a measure of control over the law it has created. To the extent that we declare Federal law but foreclose review, we

undermine the Supreme Court's institutional role, denying it the opportunity to harmonize divergent State court decisions or speak on issues it deems important. The result is much the same as if the four departments of the Appellate Division were to frustrate us in the performance of our institutional responsibilities by deciding State constitutional law issues and then, by procedural means, foreclosing our review of their decisions.

Whether criticisms of the practice of dual reliance are justified as a general proposition, they are valid when the procedure followed in this case is considered.[2] Our original decision contained no statement that it rested on independent State grounds (*see*, 74 NY2d 548). With the case in that posture, the Supreme Court granted certiorari, indicating its desire to pass on the issues of Federal law, and remitted the case to us as a matter of comity before ruling so that we might reconsider it in light of the intervening *Milkovich* decision. We have reviewed the appeal and concluded that under *Milkovich* the plaintiff has failed to satisfy its burden of proving defamation. The majority does not stop there, however. Having previously invited Supreme Court review by failing to rest our decision on independent State grounds, it now changes course and blocks that review by asserting them.

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[2]As Judge Kaye notes (majority opn, at 251), neither the Court nor its individual Judges have consistently followed any announced standards for departing from Federal law to adopt a different State rule or settled on any preferred methodology for doing so (*but see, People v P. J. Video*, 68 NY2d 296). No problem is presented when, as in the first appeal in this case, we perceive Federal and State law to be the same. But when they diverge, we have followed a variety of approaches. Indeed, the Court recently has appeared to shy away from establishing any standards and, without guidance from us, parties have been free in cases asserting both Federal and State constitutional claims to rely on the general equities of the case, to appeal to the subjective views of the individual Judges on what the rule ought to be and to urge adoption of the methodology best suited to arrive at the desired result. Hopefully we will, in time, achieve an articulable consensus on how these matters should be handled. To that end, I first stated my opposition to the dual method in *Matter of Patchogue-Medford Congress of Teachers v Board of Educ.* (70 NY2d 57, 71 [Simons, J., concurring]) and my opposition to going beyond the necessities of the case to declare new State law in *People v Vilardi* (76 NY2d 67, 78 [Simons, J., concurring]).

The majority contends this procedure is warranted by concerns of finality and judicial economy. Those are practical concerns present in every case. They rarely justify overriding established rules of judicial restraint and they should hardly control the decision-making process in this case. If the law was such that plaintiff could prevail on Federal grounds but could not prevail on State grounds, then resort to the protection afforded by our State Constitution might be justified. But plaintiff has no cause of action on Federal grounds, even with the narrow protection the majority accords defendant under *Milkovich*. If, notwithstanding this holding, we had proceeded in our Federal analysis to examine the role of context in opinion cases it would represent inexcusable dictum because it would not control the outcome of the case. It becomes no less so because the discussion is cast in terms of State law.

The result of reaching both State and Federal grounds is that the discussion of Federal law, under Supreme Court precedent, is dictum because we have relied on independent State grounds. Conversely, the discussion of State grounds is largely dictum because context is not controlling in this case. The process is not in keeping with our institutional responsibility to provide stability and certainty in the development of law.

Accordingly, I concur for affirmance solely on the ground that the plaintiff's claims are not actionable under the holding in *Milkovich v Lorain Journal Co. (supra)*.

TITONE, J. (concurring).

As do each of the other six members of this Court, I concur in the conclusion that plaintiff has not established an actionable defamation and that, accordingly, its complaint was properly dismissed. I also join in many of the concerns addressed in Judges Simons's and Hancock's concurrences about the propriety and wisdom of deciding this appeal on alternative State and Federal constitutional analyses. Judge Simons's extended discussion of the apparent inconsistency in the majority's two-part analysis, as well as his review of the jurisprudential considerations militating against the majority's use of the "dual" approach in this

case, are thorough and persuasive, and require no further elaboration here.* Nonetheless, I have chosen to write separately because, in my view, the controlling legal principles should, at least in the first instance, be derived from State, rather than Federal, law.

Even if, as the majority's opinion suggests, the Supreme Court's recent decision in *Milkovich v Lorain Journal Co.* (497 US —, 110 S Ct 2695) has changed the contours of what is actionable under the Federal Constitution, (*but see*, 497 US —, 110 S Ct, at 2708-2709, *supra* [Brennan, J., dissenting]; *see also*, concurring opns per Simons, J., at 258-259, Hancock, Jr., J., at 268), its over-all significance for our present purposes should not be overestimated. *Milkovich* and its predecessor *Gertz v Robert Welch, Inc.* (418 US 323) merely established and shaped the constitutional floor below which state defamation rules may not fall (*see, People ex rel. Arcara v Cloud Books*, 68 NY2d 553, 557; *see also*, Kaye, *Dual Constitutionalism in Practice and Principle*, 61 St John's L Rev 399, 403). As such they simply delineated the limitations imposed by the First Amendment on the State-derived common-law rights of defamation plaintiffs. There is nothing in *Milkovich* or any of the related cases that impairs the States' power to impose additional limitations, based on either their own Constitutions or the traditions underlying their previously established common-law doctrines (*see, e.g., PruneYard Shopping Center v Robins*, 447 US 74).

Thus, our first obligation, as a State common-law court is to determine whether the dismissal of this plaintiff's complaint is consistent with our State's common-law and constitutional defamation rules. Resolution of this question is, in my view, a necessary

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*Like Judge Hancock, I would not rule out the use of the "dual" approach in cases where the posture makes it necessary or appropriate (*see, e.g., People v Dunn*, 77 NY2d 19). In this case, however, the approach seems particularly inapt because, as the majority itself admits, its Federal constitutional analysis is inconclusive. Further, to the extent that a tentative conclusion has been reached, the Federal analysis leads to the same conclusion as does the "independent and *adequate*" State law rationale and, consequently, is unnecessary dictum.

and logically prior step that must be taken before any Federal constitutional issue is considered. As one State court has aptly observed: "The proper sequence is to analyze the state's law, including its constitutional law, before reaching a Federal constitutional claim. This is required, not for the sake either of parochialism or of style, but because the state does not deny any right claimed under the Federal Constitution when the claim before the court in fact is fully met by state law" (*Sterling v Cupp*, 290 Ore 611, 614, 625 P2d 123, 126 quoted in *Massachusetts v Upton*, 466 US 727, 736 [Stevens, J., concurring]; *accord, State v Badger*, 141 Vt 430, 448, 450 A.2d 336, 347 ["(f)ulfillment of this Court's responsibilities as a member of the federalist system requires us to consider the availability of state grounds before federal appeal"]).

Under our system of federalism, the State courts have both the privilege and the responsibility of enunciating the State's law and providing the first line of protection for the people's liberties. "It is also important that state judges do not unnecessarily invite [the Supreme Court] to undertake review of state-court judgments" (*Massachusetts v Upton, supra*, at 737 [Stevens, J., concurring]).

With these principles in mind, I would decide this case solely by reference to New York State law, specifically its *common-law* defamation precepts. Indeed, in this State there exists a pre-*Gertz* body of case law that remains untouched by *Milkovich* and provides an ample framework for resolving the issue placed before us on this remand.

As this Court observed the first time this case was before it, the roots of the modern, constitutionally-based opinion privilege lie in the common-law doctrine according a qualified privilege to "fair comment" (74 NY2d, at 555). This doctrine has existed as part of New York's common law of defamation, albeit in cramped form, since at least 1840, when a journalist named Stone was sued for his vitriolic denunciation of a book authored by James Fenimore Cooper (*Cooper v Stone*, 24 Wend 434; *see also, Bingham v Gaynor*, 203 NY 27; *Triggs v Sun Print & Publ. Assn.*, 179 NY 144; *Hamilton v Eno*, 81 NY 116). By 1930, this Court had unequivocally stated that "[e]very one has a right to comment on matters of public interest and concern, provided he does so fairly and with an honest purpose" (*Hoeppner v Dunkirk Print. Co.*, 254 NY 95, 99). And, by the latter half of the twentieth century, the

"fair comment" doctrine was being applied expansively so as to make New York's common-law defamation rules consistent with the State and Federal constitutional guarantees of free speech, as well as with the value that society places on the open and free exchange of ideas (*see, e.g. Julian v American Business Consultants*, 2 NY2d 1; *see also, Cole Fisher Rogow, Inc. v Carl Ally, Inc.*, 25 NY2d 943).

To be sure, when *New York Times Co. v Sullivan* (376 US 254) and its progeny introduced a constitutional dimension into the law of defamation, judicial attention shifted away from the evolving common-law "fair comment" privilege and, in its stead, a parallel body of constitutional case law premised on the dictum in *Gertz v Robert Welch, Inc.* (418 US 323, 339-340, *supra*) was developed (*see, e.g., Rinaldi v Holt, Rinehart & Winston*, 42 NY2d 369), culminating in our Court's recent decisions in *Steinhilber v Alphonse* (68 NY2d 283) and this case (74 NY2d 548, *supra*). However, now that *Gertz* has proven to be a false lead, we may, without serious difficulty, retrace our steps and pick up the path where we left it when *Gertz* was decided. Such a course would lead to essentially the same conclusion that the majority has reached, i.e., that the statements plaintiff challenges are not actionable.

As was true of the line of cases built upon *Gertz v Robert Welch, Inc.* (*supra*), the central concern of the "fair comment" cases was to protect both "the right to comment on public affairs" and "the public's access to important information" (*see, Immuno, AG. v Moor Jankowski*, 74 NY2d 548, 556, *supra*). In furtherance of that concern, it is highly appropriate to consider the context, tone and character of a statement challenged as defamatory when determining whether it constitutes a privileged "fair comment" or an actionable assertion of fact. Indeed, our common-law cases have often included references to reading the challenged work "as a whole" and in their proper context (*e.g., James v Gannett Co.*, 40 NY2d 415, 419-420; *Julian v American Business Consultants*, 2 NY2d 1, 14-15, *supra*). The majority's current rationale, which emphasizes "the content of the whole communication, its tone and apparent purpose" (majority opn, at 254), fits easily and neatly within this analytical framework.

The approach I advocate—considering State common-law

principles before looking to the State Constitution's strictures—is particularly apt in this context, where the cause of action and the corresponding rights and duties of the parties are themselves creatures of the common law. In most of our prior decisions holding a State constitutional provision to be more protective of individual liberties than its Federal counterpart, the particular right at issue had no source at all other than constitutional law. In *People v Griminger* (71 NY2d 635), *People v P. J. Video* (68 NY2d 296), *People v Class* (67 NY2d 431) and *People v Bigelow* (66 NY2d 417), for example, we were called upon to decide the scope of the rights conferred by article 1, §12 of our State Constitution where the only other possible source of the protection was the Fourth Amendment to the Federal Constitution—and that source had been ruled unavailable (*cf., People v Johnson*, 66 NY2d 398; *see also, People ex rel. Arcara v Cloud Books*, 68 NY2d 553, *supra* [constitutional free speech guarantee]; *People v Bethea*, 67 NY2d 364 [constitutional privilege against self-incrimination]; *Sharrock v Dell Buick-Cadillac* 45 NY2d 152 [constitutional due process guarantee]; *People v Hobson*, 39 NY2d 479 [constitutional right to counsel guarantee]). In such circumstances, there is no choice but to invoke the State Constitution, and we properly did not hesitate to do so.

Here, in contrast, the controversy concerns the scope of, and restrictions upon, private rights whose immediate source is a judicially created common-law cause of action, i.e., defamation. In this context, it seems more than a little anomalous to leap directly to an inquiry into what the State Constitution forbids. Implicit in such an inquiry is the assumption that were it not for the constitutional restraints, the law would permit what is determined to be constitutionally forbidden. While such an approach may be required when the court is called upon to enforce an unambiguous rule established by another branch of government, such as a legislative enactment, it seems out of place when the rule to be enforced is a common-law rule *of the courts' own making*. In the latter circumstance, the sounder approach would be to simply shape the common law rule so as to avoid a constitutional clash. Such an approach is particularly appropriate in an area where, as here, the common-law has not developed and hardened to the point where a constitutionally compatible rule is foreclosed by clear precedent.

Whether we use common-law principles to "inform" our constitutional analysis (majority opn, at 250) or instead reverse that order of priority as I suggest (*see also, People v Conyers*, 52 NY2d 454) is not merely a matter of semantics. The approach I suggest has the advantage of being in harmony with the well-established principle that courts should avoid passing upon constitutional questions when the case can be disposed of in another way (*e.g., Matter of Beach v Shanley*, 62 NY2d 241, 254; *People v Felix*, 58 NY2d 156, 161). It also avoids a problem I have previously mentioned in connection with constitutionally based decision making, i.e., the practical difficulty of reversing or modifying the rule that the judiciary has adopted (*see*, Titone, *State Constitutional Interpretation: The Search for an Anchor in a Rough Sea*, 61 St John's L Rev 431, 439, and n 39; *see also*, Maltz, *The Dark Side of State Court Activism*, 63 Tex L Rev 995, 1000).

In summary, I agree with the majority's ultimate conclusion that the statements contained in the McGreal letter do not constitute express or implied assertions of fact and are therefore not actionable under our State's law. That conclusion, for me, ends the inquiry. Accordingly, I vote to affirm the decision below dismissing plaintiff's complaint.

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HANCOCK, JR., J. (concurring).

I agree with Judge Simons (Concurring opn, Part II) that this appeal is properly resolved under *Milkovich v Lorain Journal Co.* (497 US —, 110 S Ct 2695) without addressing the issue of context. Were a discussion of this issue warranted, however, I would hold that nothing in *Milkovich* suggests that the Supreme Court has altered its attitude toward the context of and circumstances surrounding written or spoken words as an obvious and ordinarily indispensable consideration in deciding the legal question "of what the average person hearing or reading the [words] would take [them] to mean" (*Steinhilber v Alphonse*, 68 NY2d 283, 290). On the contrary, the majority's opinion in *Milkovich* and its discussion of the "context" cases (*see particularly, Greenbelt Publ. Assn. v Bresler*, 398 US 6, 13-14; *Letter Carriers v Austin*, 418 US 264, 284-286; *Hustler Mag. v Falwell*, 485 US 46, 53-57) as well as Justice Brennan's dissenting opinion

in *Milkovich* (*see particularly*, 497 US, at —, 110 S Ct, 2708-2710) lead me to the conclusion that context continues as a factor of undiminished significance and that the Federal law as summarized in *Steinhilber v Alphonse* (68 NY2d 283, 289-292 *supra*) is essentially unchanged (*accord*, *The Supreme Court, 1989 Term—Leading Cases*, 104 Harv L Rev 219, 223; *see also*, concurring opn of Simons, J., at 258-259).

There are cases, in my opinion, where basing a decision on both Federal and State constitutional grounds may be entirely appropriate. For the reasons stated by Judge Simons (concurring opn, at 262-263), however, I am persuaded that this is not such a case. Accordingly, I would affirm solely on the ground that plaintiff has no cause of action under Federal law.

Chief Judge Wachtler and Judges Alexander and Bellacosa concur with Judge Kay; Judges Simons, Titone and Hancock, Jr., concur in result in separate opinions.

Upon reargument, following remand by the Supreme Court of the United States, order affirmed, with costs. Opinion by Judge Kaye. Chief Judge Wachtler and Judges Alexander and Bellacosa concur. Judges Simons, Titone and Hancock concur in result in separate opinions.

ORIGINAL DECISION OF THE COURT OF APPEALS
OF NEW YORK
(December 14, 1989)

74 N.Y.2d 548, 549 N.Y.S.2d 938, 549 N.E.2d 129

State of New York
Court of Appeals

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1 No. 253
Immuno, A.G.,
Appellant,

OPINION

v.
J. Moor-Jankowski,
Respondent.

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KAYE, J.

This appeal concerns application of the "settled rule that expressions of an opinion 'false or not, libelous or not, are constitutionally protected and may not be the subject of private damage actions'". *(Steinhilber v Alphonse,* 68 NY2D 283, 286.) Settled though the rule may be, the line separating protected expressions of opinion from actionable assertions of fact has proved elusive. In this case, the primary—and vehemently contested—dispute between the parties concerns the proper category for a letter to the editor of a scientific journal.

I.

This libel action arises out of a letter to the editor published in the Journal of Medical Primatology in December 1983. The letter was written by Dr. Shirley McGreal, chairwoman of the International Primate Protection League (IPPL), an organization known for its vigorous advocacy on behalf of primates, particularly those used for biomedical research. Defendant Dr. J. Moor-Jankowski, a professor of medical research at New York University School of Medicine and director of the Laboratory for Experi-

mental Medicine and Surgery in primates of the New York University Medical Center, is cofounder and editor of the Journal.

The subject of McGreal's letter (reprinted at 145 AD2d, at 118-120) was a plan by plaintiff, Immuno AG.—a multinational corporation based in Austria that manufactures biologic products derived from blood plasma—to establish a facility in Sierra Leone for hepatitis research using chimpanzees. McGreal's letter was critical of Immuno's proposal on a number of grounds: (1) that the motivation for the plan was to avoid international policies or legal restrictions on the importation of chimpanzees, an endangered species; (2) that it could decimate the wild chimpanzee population, as capture of chimpanzees generally involved killing their mothers, and efforts at returning experimental animals to the wild (as plaintiff proposed) were of questionable success; and (3) that returning the animals to the wild risked spreading hepatitis to the rest of the chimpanzee population. McGreal stated that the current population of captive chimpanzees should be adequate to supply any legitimate requirements.

The letter was prefaced by an editorial note written by defendant that set out its background. Identifying McGreal as chairwoman of IPPL, the note stated that the Journal had received the initial version of the letter in January 1983 and had submitted it to plaintiff for comment or reply. Plaintiff had acknowledged receipt of the letter in February, offering no comment but that it was referring the matter to its New York lawyers. Thereafter, plaintiff's lawyers wrote that McGreal's statements were inaccurate, unfair and reckless, and requested the documents upon which the accusations were based, threatening legal action if the letter were printed before plaintiff had a meaningful opportunity to reply. The editorial note went on to state that the editors had advised plaintiff's attorneys that they should obtain the documentation directly from McGreal, and extended the period for plaintiff's reply by two months. The letter was published nearly a year after its receipt, after articles had appeared in the Austrian press apparently confirming much of what McGreal had written, and after receiving no further word from plaintiff or its lawyers.

In addition to the McGreal letter that is the focus of contention, plaintiff complains that it was defamed by comments made by defendant quoted in an article entitled "Loophole May Allow

Trade in African Chimps" that appeared in the New Scientist magazine shortly before McGreal's letter was published. Defendant is quoted as saying that the supply of captive chimpanzees was sufficient for research, describing defendant's attempts to circumvent controls on endangered species as "scientific imperialism," and warning that they will "backfire on people like me involved in the bona fide use of chimpanzees and other primate animals" for research.

In December 1984, plaintiff commenced this lawsuit against Moor-Jankowski and seven other defendants, including McGreal and the publishers and distributors of the New Scientist and the Journal of Medical Primatology. All the defendants save Moor-Jankowski settled with plaintiff for what the motion court described as "substantial sums," and the complaint was dismissed as to them. After extensive discovery, defendant moved for summary judgment. Supreme Court granted the motion to the extent of dismissing a claim for prima facie tort. It denied the motion as to the defamation claims, ruling that the statements at issue were statements of fact and, regardless of whether plaintiff was a public figure, there were triable issues of fact concerning whether defendant acted with actual malice in making or publishing the statements.

On defendant's appeal, the Appellate Division unanimously reversed, granted defendant's motion and dismissed the complaint. The court held that all of the comments attributed to defendant in the New Scientist article were expressions of opinion that could not, as a matter of law, support an action for defamation. As to the McGreal letter, the Appellate Division held that for the most part it too was a constitutionally protected expression of opinion. To the extent that it contained statements of a factual nature, the Appellate Division examined each statement meticulously, and concluded from the voluminous record not only that plaintiff had failed to adduce evidence of falsity but also that all such factual assertions were demonstrably true.

[1] With respect to the comments attributed to defendant in the New Scientist article, we now affirm the Appellate Division order for the reasons stated by that court (145 AD2d 114, 143). With respect to the McGreal letter, we also affirm the Appellate Division order, but on a somewhat different analysis.

## II.

However difficult the philosophical or practical problem of disentangling assertions of fact from statements that do not imply or assert factual matters ("opinion" in the parlance of defamation law analysis), it is settled that pure opinion-however misguided or vituperative-is entitled to the absolute protection of the State and Federal constitutional free speech guarantees (*see, Steinhilber v Alphonse*, 68 NY2d, at 289, *supra; Ollman v Evans*, 750 F2d 970, 974-975, n 6 [DC Cir] [en banc], *cert denied* 471 US 1127).

This distinction between fact and opinion, which grew out of the common-law doctrine of fair comment, was elevated to constitutional status, in the interpretation of State and Federal courts, by the Supreme Court's widely cited dictum in *Gertz v Robert Welch, Inc.* (418 US 323, 339-340), that "[u]nder the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open debate on the public issues.'" (Quoting, *New York Times Co. v Sullivan*, 376 US 254, 270.)

It has been suggested that one reason for the distinction between fact and opinion is that statements of fact have greater potential for influence and hence are likelier to damage reputation than mere expressions of opinion, which are more readily discounted by the reader or listener. (Note, *Fair Comment*, 62 Harv L Rev 1207, 1213 [1949].) The *Gertz* passage suggests two additional rationales. The first concerns institutional competence: unlike an assertion of fact, which may be proven true or false by objective standards, an idea or opinion is not susceptible to such measurement by courts and juries.

Perhaps closest to the roots of the distinction in the doctrine of fair comment is the second thread of the *Gertz* dictum—that unlike assertions of fact, ideas or opinions merit protection for their role in a competition or marketplace of ideas, as stimulants of "uninhibited, robust and wide-open debate on the public issues." The more limited common-law defense of fair comment

which, among its other elements, required that the criticism concern a matter of legitimate public interest, was similarly concerned with public debate. It protected the right to comment on public affairs and ensured the public's access to important information (*see,* Note, *The Fact-Opinion Determination in Defamation,* 88 Colum L Rev 809, 811 [1988]; Titus, *Statement of Fact Versus Statement of Opinion-A Spurious Dispute in Fair Comment,* 15 Vand L Rev 1203 [1962]). This central concern informs not only its foundation but also the law that has grown out of *Gertz.*

In reviewing the underpinnings for the distinction between fact and opinion, moreover, it is above all important to bear in mind that the exercise is not merely one in semantics. Several courts and commentators have criticized as inadequate any analysis that does not give central significance to the role played by the challenged statements in public debate, or to the "core value" of the free speech guarantee (*see, e.g., Ollman v Evans,* 750 F2d, at 996 [Bork, J., concurring], *supra; Janklow v Newsweek, Inc.,* 788 F2d 1300, 1302-1303 [8th Cir]; Note, *The Fact-Opinion Determination in Defamation, op. cit.,* at 831-840).

While eschewing adherence to any rigid criteria for resolving the legal question of whether a statement is one of fact or opinion, this court has recognized as helpful the four factors identified by the plurality in *Ollman* (750 F2d, at 979, *supra):* "(1) an assessment of whether the specific language in issue has a precise meaning which is readily understood or whether it is indefinite and ambiguous; (2) a determination of whether the statement is capable of being objectively characterized as true or false; (3) an examination of the full context of the communication in which the statement appears; and (4) a consideration of the broader social context or setting surrounding the communication including the existence of any applicable customs or conventions which might 'signal to readers or listeners that what is being read or heard is likely to be opinion, not fact.'" (*Steinhilber v Alphonse,* 68 NY2d, at 292, *supra.)* Attention to these factors enables a court to perform its essential task in determining whether a given statement expresses opinion, which is to ascertain "what the average person hearing or reading the communication would take it to mean." (*Id.,* at 290.)

We next apply these legal principles to the facts at hand.

## III.

In performing the essential task of ascertaining what the average person reading McGreal's letter would take it to mean, we begin our analysis (as did *Ollman*) with an examination of the context of the challenged remarks. Unlike *Steinhilber* and its predecessors, what is at issue in this case is a special type of expression—a letter to the editor.

Broadly speaking, there are three major types of journalistic activity (*see*, Franklin, *Libel and Letters to the Editor: Toward an Open Forum*, 57 U Colo L Rev 651 [1986]). The first is originating or investigative activity, such as news reporting. Second is commentary or criticism, which generally is protected as opinion. The third function many publications serve is to transmit the views of readers, by providing a public forum known as letters to the editor.

There is a manifest difference between ordinary reporting and letters to the editor. As a rule, such letters are not published on the authority of the newspaper or journal. In this case, for instance, defendant's prefatory editorial note signaled that the letter was to be given only the weight its readers chose to accord McGreal's views; such reservations may be generally understood even when letters are not accompanied by any editorial note. Thus, any damage to reputation done by a letter to the editor generally depends on its inherent persuasiveness and the credibility of the writer, not on the belief that it is true because it appears in a particular publication.

Most importantly, for many members of the public, a letter to the editor may be the only available opportunity to air concerns about issues affecting them. "When a citizen is troubled by things going wrong, he should feel free to 'write to the newspaper': and the newspaper should be free to publish his letter. It is often the only way to get things put right" (*Slim v Daily Tel.*, [1968] 2 QB 157, [1968] 1 All ER 497, 503, quoted in *Pollnow v Poughkeepsie Newspapers*, 107 AD2d 10, 16 [Titone, J.], aff'd on other grounds 67 NY2d 778). The availability of such a forum is important not

only because it allows persons or groups with views on a subject of public interest to reach and persuade the broader community but also because it allows the readership to learn about grievances, both from the original writers and from those who respond, that perhaps had previously circulated only as rumor; such a forum can advance an issue beyond invective. Finally, at the least, the public may learn something, for better or worse, about the sort of person or group that would write such a letter (*see,* Franklin, *op. cit.*, at 663-664).

Thus, in determining how the average person would view McGreal's letter, we take into account that it is a letter to the editor and that "the common expectation of a letter to the editor is not that it will serve as a vehicle for the rigorous and comprehensive presentation of factual matter but as one principally for the expression of individual opinion." (145 AD2d, at 129.)

Passing from the broader social setting to the immediate context of the letter, we note that the common expectation regarding letters to the editor has particular pertinence here.

As the Appellate Division observed, the Journal of Medical Primatology is directed at a highly specialized group of readers—medical doctors, researchers and the medical and science libraries of academic institutions; the average reader is thus likely not a novice in the field of medical primatology, but brings a "well-developed understanding of the issues facing biomedical researches using primates as research subjects." (145 AD2d, at 129.) The prefatory note additionally called particular attention to the circumstances surrounding the letter, pointing up that this was Dr. McGreal's view, and that plaintiff's attorneys considered her statements to be "wholly inaccurate and reckless" and "not a fair comment" on plaintiff's proposed project.

The letter itself related to a public controversy regarding use of live animals belonging to endangered species, including chimpanzees, in animal experimentation and research. McGreal (a known animal rights activist) and IPPL (whose very name broadcasts its point of view) were fully identified to readers of the letter. The letter made clear that its purpose was to voice the concerns of this partisan group in order "to draw this situation to the attention of interested parties."

Thus, like the broader social setting of McGreal's letter, its immediate context would induce the average reader of this Journal to look upon the communication as an expression of opinion rather than a statement of fact.

Nor can it be said from the specific language, viewed in its totality, that the body of the letter conveyed statements intended to be understood and accepted by the average reader of this publication as gospel. As a practical matter, it is hard to conceive that any published statement could be wholly devoid of factual reference. Like most—if not all—letters to the editor, McGreal's was provoked by a particular state of affairs, and her letter set out its point of reference. That factual reference point of course must not be false (*see, Silsdorf v Levine,* 59 NY2d 8), but in the present case the Appellate Division's extensive analysis amply establishes that plaintiff raised no triable issue of fact as to the falsity of the threshold assertions of McGreal's letter.

Beyond that threshold reference point, from start to finish the body of the letter communicated the accusations of a group committed to the protection of primates and openly critical of plaintiff's project. Within that framework, the writer presumed and predicted as to what "appeared to be" or "might well be" or "could well happen" or "should be" the motivations for and future consequences of plaintiff's proposed chimpanzee research program, plainly relating matters of opinion rather than flat-out, measurable statements of fact.

Speculations as to the motivations and potential future consequences of proposed conduct generally are not readily verifiable, and are therefore intrinsically unsuited as a foundation for libel (*see, Rinaldi v Holt, Rinehart & Winston,* 42 NY2d 369, *cert denied* 434 US 969).

We reject plaintiff's invitation to engage any further in what would in essence be "a Talmudic parsing" of the length and breadth of this letter, as if "with a philosophical enterprise or linguistic analysis. Ours is a practical task, with elemental constitutional values of freedom looming large as we go about our work. And in that undertaking, we are reminded by *Gertz* itself of our duty 'to assure to the freedoms of speech and press that "breathing space" essential to their fruitful exercise.'" (*Ollman*

*v Evans*, 750 F2d 970, 991, *supra.)*

Finally, while structuring our analysis to fit within the hardened categories of "fact" and "opinion," we additionally look beyond them to the core values protected by the State and Federal Constitutions. The public forum function of letters to the editor is closely related in spirit to the "marketplace of ideas" and oversight and informational values that compelled recognition of the privileges of fair comment, fair report and the immunity accorded expression of opinion. These values are best effectuated by according defendant latitude to publish a letter to the editor on a matter of legitimate public concern—the letter's author, affiliation, bias and premises fully disclosed, rebuttal openly invited—free of defamation litigation. A publication that provides a forum for such statements on controversial matters is not acting in a fashion "at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected" (*Garrison v Louisiana*, 379 US 64, 75), but to the contrary is fostering those very values.

[2] While concluding that the McGreal letter is within the protection of the constitutional free speech guarantee, two additional matters bear mention.

First, we agree with plaintiff that had defendant deliberately incited McGreal to have a defamatory letter to the editor published, no privilege would shield him from liability. Although defendant discussed the contents of McGreal's letter with her and made suggestions about its contents, plaintiff's allegations of a deliberate effort, or conspiracy, to smear its reputation are entirely conclusory, and therefore do not preclude summary judgment in defendant's favor.

Second, this case—having already engendered thousands of pages of a litigation record and "substantial" settlements from all other defendants—exemplifies that the "'threat of being put to the defense of a lawsuit * * * may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself'". *(Karaduman v Newsday, Inc.*, 51 NY2d 531, 545.) We have therefore stressed the particular role and importance of summary judgment, where appropriate, in libel cases (*see also*, 145 AD2d, at 127-128). That chilling effect can be especially

severe for scholarly journals, such as defendant's, whose editors will likely have more than a passing familiarity with the subject matter of the specialized materials they publish; if required as to every line of a reader's expressed viewpoint to meet the standard of *Chapadeau v Utica-Observer Dispatch* (38 NY2d 196), they may as a practical matter have little alternative to lengthy litigation or substantial settlement. In such instances, hypertechnical parsing of a possible "fact" from its plain context of "opinion" loses sight of the objective of the entire exercise, which is to assure that—with due regard for the protection of individual reputation—the cherished constitutional guarantee of free speech is preserved.

Accordingly, the order of the Appellate Division should be affirmed, with costs.

Chief Judge Wachtler and Judges Simons, Alexander, Titone, Hancock, Jr., and Bellacosa concur.

Order affirmed, with costs.

OPINION OF THE SUPREME COURT OF NEW YORK
NEW YORK COUNTY

(Filed August 6, 1987)

Supreme Court : New York County MI 17
IAS PART 10

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IMMUNO AG,

Plaintiff,

- against -

J. MOOR-JANKOWSKI,

Defendant.

Index No.
23545/84

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BEATRICE SHAINSWIT, J.:

Defendant moves for an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint.

This motion was begun by a moving affidavit sworn to on September 5, 1986; the final opposing memorandum of law was submitted on April 2, 1982, replying to movant's last papers a week earlier. In the interim the Court received a 100 page supporting memorandum of law, reply memoranda, surreply memoranda, second surreply memoranda, and supplemental reply memoranda, in addition to four main affidavits on each side, bound volumes containing dozens of supplemental affidavits, bound volumes of exhibits whose numbering ran through the alphabet twice, and innumerable letters from both sides. The Court is constrained to observe that those massive submissions were inappropriate.

Plaintiff in this libel action is Immuno, A.G., an Austrian-based multinational corporation engaged in research, development,

manufacturing and marketing of biological pharmaceutical products for therapeutic and preventive uses, including vaccines. Defendant, Dr. Jan Moor-Jankowski, a scientist engaged in biomedical research, is a professor at New York University and Director of the Laboratory for Experimental Medicine and Surgery in Primates ("LEMSIP")—a private medical research facility founded by defendant and brought by him to NYU in 1965—and editor-in-chief of the *Journal of Medical Primatology*.

The resolution of this motion requires a historical background. The action had its genesis in a proposed plan by Immuno to establish a biomedical research facility in the West African nation of Sierra Leone, using captured wild chimpanzees for preclinical testing of hepatitis vaccines. Chimpanzees, being primates, are extremely valuable in research because they are closely related to human beings. Indeed, they have been described as providing an irreplaceable model for study of certain human health problems, with the only alternative subject for such studies being man himself. Specifically, chimpanzees are the only other species that develops type B hepatitis, a major disease of humans, and therefore are used to study hepatitis and to develop and test vaccines.

The population of chimpanzees in the wild has diminished drastically-due, in large part, to (a) the destruction of their habitat in the forests of West Africa by loggers and farmers seeking agricultural land, and (b) the extermination of the chimpanzees themselves by native farmers, who consider them pests because they eat crops. Moreover, chimpanzees do not breed very successfully in captivity, and many nations ban the export of chimpanzees entirely. (They are protected by an international convention [to which the United States is a signatory], the Convention on International Trade in Endangered Species). As a result of these factors, there is a severe shortage of chimpanzees available for medical research.

***THE ALLEGED LIBELS***

The first libels upon which this action is hinged have their genesis in a letter to the Editor, and an accompanying Editorial Note, published in the Journal of Medical Primatology. The Letter to the Editor was sent to the Journal by Dr. Shirley

McGreal, Chairman of the International Primate Protection League. (Dr. McGreal is not a medical doctor; she is a doctor of education. For reasons which are unclear at this time, but may take on evidentiary significance at trial, when the Letter to the Editor was published, the title "MD" was added after her name.)

Dr. McGreal's letter to the Editor was entitled "A Project With Potential to Spread Non-A, Non-B Hepatitis in West Africa" and stated:

> "The International Primate Protection League has learned with concern of proposals submitted by Immuno AG Company of Austria to the Government of Sierra, Leone, West Africa, regarding the company's plans to establish a chimpanzee research facility in Sierra Leone, West Africa.
>
> According to a statement dated August 23, 1982 submitted to the Government of Sierra Leone by Klaus Bieber, Austrian Consul in Sierra Leone, the animals would be used in hepatitis non-A, non-B research and testing of hepatitis B vaccine. The purpose of establishing the facility in Africa was stated to be 'to avoid the problems involved with the importation of live chimpanzees.' Presumably, these 'problems' include national and international laws and treaties regarding the movement of live animals belonging to endangered species. The chimpanzees *Pan troglodytes* is listed in Appendix I of the Convention on International Trade in Endangered Species.
>
> Besides getting round restrictions on the international movement of chimpanzees, cheapness of wild-caught chimpanzees appears to be a motivating factor for the Immuno Company. According to the Austrian newspaper Presse (February 3, 1983), Immuno Official Johann Eibl stated that captive breeding of chimpanzees was not an economically viable proposition.
>
> The proposed facility would procure 60-80 chimpanzees per year, to be obtained from the wild. However, according to Bieber's statement, 'it must be emphasized

that the research will not bring about a decimation of chimpanzees: on the contrary, their numbers would remain stable.' Readers familiar with the destructive method by which chimpanzees are caught (killing of mothers in most cases) may be surprised at this statement. However, Bieber cheerfully explains the nondetriment theme by saying. 'Because, after going through a research circle of about 3 years, the animals will be in perfect condition and ready for rehabilitation into the wild.'

1. Release of chimpanzee 'veterans' of hepatitis non-A, non-B research would be hazardous to wild populations, as there is no way to determine that an animal is definitely not a carrier of the disease. Should release of carrier animals occur, hepatitis could well spread among wild chimpanzees over large parts of Africa. Thus chimpanzees could well become a reservoir for hepatitis just as bats are a reservoir for rabies. The result might be increased human persecution of chimpanzees.

2. Although chimpanzee rehabilitation has acquired a certain 'chic,' it is well known that wild chimpanzees attack introduced newcomers. For this reason, chimpanzees in the Mount Asserik project in Senegal directed by Stella Brewer had to be recaptured and released on islands in the River Gambia with no resident chimpanzees. As yet, no permanent home has been located for these animals. The rehabilitation procedures take many years per animal and are extremely costly and hence not feasible on the scale that would be required to start 60-80 animals per year on rehabilitation. Assuming a 5-year training per animal, there could be up to 400 animals undergoing rehabilitation at any given time, at the cost of millions of dollars annually. It is questionable whether, in spite of the most dedicated efforts, any rehabilitated chimpanzees will become totally normal, since they are usually removed from the wild at 1-2 years of age and thus miss the most critical years of their social development.

3. Capture of wild chimpanzees for research is in clear

violation of the World Health Organization's 1982 statement on the procurement of primates for biomedical research. Chimpanzees are listed in the Red Data Book of the International Union for the Conservation of Nature as 'vulnerable.' The WHO statement 'strongly recommends' that endangered, vulnerable, and rare species be considered for use in biomedical research projects only if they are obtained from *existing* [emphasis added] self-sustaining captive breeding colonies (i.e., captive-breeding all animals required to at least the F-2 generation).

4. Currently, there are over 1000 chimpanzees in US laboratories, as well as large numbers in the Netherlands, Poland, Liberia, etc. These animals should be enough to supply any legitimate requirements for chimpanzees.

The International Primate Protection League shares the scientific community's concern over hepatitis. However, we feel that a way can and must be found to solve this problem without recourse to the dwindling populations of wild chimpanzees. Therefore, we appreciate the opportunity to draw this situation to the attention of interested parties.

Shirley McGreal, MD
Chairwoman
International Primate
Protection League
P.O. Drawer X
Summerville, SC 29483"

The Letter to the Editor was prefaced by the following accompanying Editorial Note, written by defendant Moor-Jankowski (it is conceded that this was the first and only time in the history of the Journal that such an accompanying note had appeared):

"In January 1983, the Editors of the Journal of Medical Primatology received a letter from Dr. Shirley McGreal,

Chairwoman of the International Primate Protection League, alerting the biomedical community to a new attempt to establish another chimpanzee research laboratory in Africa. This was seen by Dr. McGreal as a violation of the World Health Organization's 1982 statement on the procurement of primates for biomedical research, and as away to avoid the Convention on International Trade in Endangered Species (CITES).

The Editors submitted Dr. McGreal's letter for 'comments or reply' to IMMUNO AG in Vienna, Austria which had been mentioned as the company interested in establishing the laboratory. IMMUNO acknowledged the receipt of the letter on February 17, 1983, but provided no comments, referring the matter to their lawyers in New York. The lawyers requested that the Journal of Medical Primatology provide them with the documents on which Dr. McGreal's accusations were based, they termed the statements to be wholly inaccurate and reckless. They further stated (March 3rd, 1983, letter from Goldschmidt, Fredericks & Oshatz, New York): 'We would also like to advise you that our review of Dr. McGreal's letter indicates that it is not a fair comment regarding our client's activities, and should you proceed with publication, without giving us the opportunity for a meaningful response, we shall be compelled to take whatever action we deem necessary to redress our client's rights.'

The Editors advised the law firm that Dr. Shirley McGreal should be contacted directly for access to the original documents, and they extended the period for receiving the rebuttal to April 20, 1983. During that period no additional information was received from IMMUNO or from their lawyers, but in the meantime, the matter was discussed in the Austrian press, and Dr. McGreal feels that these newspaper articles confirmed the contents of her letter. The final text of Dr. Shirley McGreal's letter of March 23, 1983, reflects the discussion in the Austrian press which occurred after her initial letter of January 30th was submitted for publication and this final letter is printed below."

Plaintiff asserts that the purpose of this Editorial Note was to increase the impact of Dr. McGreal's Letter to the Editor and to convey a totally false impression of impartiality on the part of Moor-Jankowski and of authority on the part of Dr. McGreal.

In addition to the Letter to the Editor and Editorial Note published in the Journal, plaintiff complains about "waves" of similar libels, all of which allegedly originated with, or were instigated by, defendant Moor-Jankowski. For example, an article published in the October 26, 1983 edition of the *New Scientist*, written by one Nancy Heneson, entitled "Loophole May Allow Trade in African Chimps" also concerned IMMUNO's plans to establish a chimpanzee research facility in Sierra Leone. That article contained the following comments, attributed to Moor-Jankowski:

> "The role of the WHO which is backing research into hepatitis-B vaccine, is being questioned increasingly. Immuno claims to have the support of the WHO. However, Ian [sic] Moor-Jankowski, the director of New York University's Primate Research Laboratories, which is collaborating with the WHO on primate research, has condemned the project. There are enough chimpanzees in captivity to satisfy the needs of biomedical research, says Moor-Jankowski. Immuno's attempt to circumvent the controls on endangered species is 'scientific imperialism'. He says. It will 'backfire on people like me involved in the bona fide use of chimpanzees and other primate animals in biomedical experimentation'.
>
> Moor-Jankowski says that the WHO will have to take a stand on the Immuno project soon because 'important people are upset' about a letter sent to the president of Sierra Leone by the Aga Khan. The hereditary ruler of the Ismaili Moslems, best known for his fabulous wealth and love of horse-racing, is also an influential member of the World Wildlife Fund's International Council."

This lawsuit was begun in December 1984 against 'J. Moor-Jankowski, Shirley McGreal, Alan R. Liss, Inc., Nancy Heneson, New Science Publications, IPC Magazine, Ltd., "John Doe" Distributor of "New Scientist" Magazine, and "John Doe"

Distributor of "Journal of Medical Primatology".' All defendants other than Dr. Moor-Jankowski—including Shirley McGreal and the publishers and distributors of New Scientist Magazine and the Journal of Medical Primatology—have settled with plaintiff for substantial sums, and the complaint has been dismissed as to them.

***THE PARTIES ARE IN SHARP DISAGREEMENT AS TO THE TRUE CORE OF THIS LAWSUIT***

In support of his motion for summary judgment dismissing the complaint, defendant Moor-Jankowski argues that this action was initiated by plaintiff in order to silence him and his valid criticism of its proposed research facility in Sierra Leone, and to squelch legitimate scientific debates among distinguished scientists. He argues that the publications were constitutionally protected expressions of opinion on a controversial subject.

Plaintiff, on the other hand, asserts that, to Moor-Jankowski, Immuno is seen as a competitor for the very limited supply of chimpanzees available for biomedical research; and he further urges that defendant used his position on the editorial staff of the Journal to attack plaintiff and other scientists. Plaintiff urges that Moor-Jankowski conspired with Dr. McGreal against plaintiff, although he knew her to be "a very radical anti-vivisectionist" and a "crazy woman."[2]

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[2]Although Moor-Jankowski has denied ever describing Dr. McGreal as a "crazy woman", plaintiff asserts that this alleged characterization of her by defendant was given to them by a former lawyer for Moor-Jankowski who is now a federal tax court judge. The court need not resolve that issue at this time. However, on this motion it is admissible not to show whether she was, in fact "crazy", but the state of mind of defendant concerning he reliability and her reputation, whether defendant acted responsibly in publishing her Letter to the Editor, and whether the defendant's "refereeing" (i.e., the allegedly independent verification of the facts asserted and conclusions reached therein) was reasonable and responsible under the circumstances. Hearsay evidence, which might otherwise be inadmissible at trial, is admissible and may be considered by the court to defeat a motion for summary judgment by showing the existence of triable factual issues (*Phillips v. Joseph Kantor & Co.*, 31 NY2d 307 [1972]). This is not to be construed as the law of the case, or a prejudgment by this court, as

(continued...)

Plaintiff contends that Moor-Jankowski conspired with, or enlisted the aid of, Dr. McGreal in order to keep her from criticizing his own activities because he, like Immuno, used chimpanzees for biomedical research, and he allegedly feared that she might turn her attentions towards his company, LEMSIP, which has been described (by another justice of this Court in an earlier motion herein) as his "alter ego".

Plaintiff has also accused Moor-Jankowski of bearing personal ill will and malice towards it, based upon an episode that occurred some years ago, when Immuno attempted to bring back to Austria some of its own chimpanzees, which it had previously furnished to LEMSIP for research purposes.[3]

Plaintiff denies most vigorously Moor-Jankowski's basic charge that it was risking a hepatitis epidemic in West Africa, planning to shoot large numbers of chimpanzee mothers in order to obtain juvenile chimpanzees for its purposes, and circumventing an international convention for the protection of chimpanzees. On the contrary, plaintiff asserts that it planned to obtain wild chimpanzees for its planned facility in Sierra Leone from an individual allegedly recommended to it by Moor-Jankowski, who was to capture chimpanzees with nets or obtain them from farmers, who kept them as pets, rather than by shooting the mothers and other adults in order to capture the babies.

*THE LAW*

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[2](...continued)
to whether the alleged statement is or is not hearsay and is or is not admissible at trial, for whatever purpose it may be offered (if at all).

[3]According to plaintiff, in 1981 Moor-Jankowski placed all types of obstacles in the way of the return to plaintiff of its chimpanzees, including the filing of a false complaint with the ASPCA and the airline and personally directing the operator of the fork lift, which was placing the cage onto a truck for transportation to the airport, to suddenly drop the cage to the ground, thereby jarring the chimpanzees unnecessarily. Defendant's motive allegedly was his ire at losing Immuno's business (and the money for LEMSIP) as well as the loss of chimpanzees with which he had been doing research.

(a) It is clear that the statements complained of by plaintiff, if false, are actionable defamations. See *Ocean State Seafood, Inc. v. Capital Newspaper*, 112 AD2d 662 (3d Dept. 1985); *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 NY2d 369, (1977), cert. den. 434 U.S. 979 (1977); *Silsdorf v. Levine*, 59 NY2d 8 (1983), cert. den. 464 U.S. 831 (1983).

(b) Defendant asserts, however, that his writings (and those of Dr. McGreal) are constitutionally protected expressions of opinion (*Rinaldi v. Holt, Rinehart & Winston, Inc., supra*). It is true that a writer cannot be sued for simply expressing his or her opinion of another person, however unreasonable or vituperative the statement may be (*Gertz v. Robert Welch, Inc.*, 418 US 323 [1974]; *Buckley v. Littell*, 539 F. 2d 882, [2nd Cir. 1976], cert. denied, 429 U.S. 1062 [1977]. But the premises on which defendant builds his defense are faulty.

It is for the Court to determine whether the complained-of statements constitute fact or opinion. The Court rules that the statements at issue are statements of fact. One cannot read the complained-of statements without coming away with the abiding understanding that defendant was making factual charges disparaging plaintiff's scientific activities—*inter alia*, as a fact, defendant was charging that plaintiff was risking a hepatitis epidemic in West Africa, cynically planning to shoot large numbers of chimpanzee mothers at periodic intervals in order to obtain juvenile chimpanzees for its own purposes, and violating, through subterfuge, an international convention for the protection of chimpanzees. It would be playing a game of semantics to endow these factual charges with the cloak of opinion.

(c) In support of his motion, defendant also argues that plaintiff is a "public figure" or a "limited purpose" or "limited issue" public figure.

A private person who is normally not a public figure may become one in a particular factual situation. Where the evidence demonstrates that plaintiff has taken affirmative steps to attract personal attention or has striven to achieve a measure of public acclaim, and by his own purposeful activities thrust himself into the public eye, he is considered a public figure (*Maule v. New York Magazine Corp.*, 54 NY2d 880 [1981]; *James v. Gannett*

*Co.*, 40 NY2d 415, 422 [1976]). Where an individual voluntarily injects himself or allows himself to be drawn into a *particular* public controversy, that person becomes a public figure for a limited range of issues, and is considered a "limited purpose public figure" (*O'Neil v. Peekskill Faculty Ass'n*, 120 AD2d 36 [2nd Dept. 1986]; *Gertz v. Robert Welch, Inc.*, *supra*, or a "limited issue public figure" (*Greenberg v. CBS, Inc.*, 69 AD2d 693 [2d Dept. 1979]).

However, a private individual does not automatically become a public figure merely by becoming involved in or associated with a matter that attracts attention. Absent proof that the plaintiff voluntarily thrust or injected himself into the forefront of a public controversy, he cannot be dragged unwillingly into the controversy and be considered a "public figure" (*Wolston v. Reader's Digest*, 443 U.S. 157 [1979]).

A "public figure" bears the burden of demonstrating with "convincing clarity" that the alleged defamatory falsehood was uttered with "actual malice", i.e., with "knowledge of falsity or reckless disregard of whether it was false or not" (*Rinaldi v. Viking Penguin, Inc.*, 52 NY2d 422, 436 [1981]; *New York Times v. Sullivan*, 376 U.S. 254, 285-286 [1964]).

It is unnecessary to rule at this time whether plaintiff is a public figure in all respects, or at the very least a limited issue public figure. Even under the stringent standard of actual malice, triable issues have been properly raised, on this record, as to whether defendant perpetrated conscious falsehoods, or published statements with reckless disregard as to whether they were true or false.

Similarly, we need not be detained by applying to this record the "grossly irresponsible" standard enunciated in *Chapadeau v. Utica Observer-Dispatch, Inc.*, 38 NY2d 196 [1975]; *Gaeta v. New York News, Inc.*, 62 NY2d 340 [1984]. Plaintiff has submitted sufficient evidence to meet the more exacting standard of constitutional "actual malice". Patently, he has also fulfilled the "grossly irresponsible" *Chapadeau* standard.

(d) The following illustrates some of the central factual issues to be resolved at a trial:

(1) Was plaintiff risking a hepatitis epidemic in West Africa for its own cynical selfish purposes?

(2) Was plaintiff bent on violating an international convention for the protection of chimpanzees?

(3) Was plaintiff engaged in a pattern of subterfuge to camouflage or circumvent its violation of an international convention?

(4) On all the evidence adduced at trial, is plaintiff to be considered a public figure for all issues, or a public figure for a limited range of issues?

(5) Assuming plaintiff is a public figure, whether for a limited range of issues or otherwise, did defendant publish alleged defamatory falsehoods with knowledge of falsity, or with reckless disregard of whether they were false or not?

(6) Assuming that the "grossly irresponsible" guidelines become applicable at trial as an alternative to *N.Y. Times v. Sullivan*, did defendant publish the alleged falsehoods in conformity with the standards of responsible journalism?

(7) Assuming that all of these factual issues are resolved in plaintiff's favor, to what extent is plaintiff entitled to a monetary award?

The trial may bring to the surface additional factual issues paralleling those defined in the course of this opinion. But enough factual issues have already emerged to leave no room for summary judgment displacing trial.

Accordingly, defendant's motion for summary judgment dismissing the defamation claims is denied.

(e) Plaintiff has also pleaded a cause of action for prima facie tort. The key to prima facie tort is the infliction of intentional harm, resulting in damage, without excuse or justification, by an act or series of acts which would otherwise be lawful (*ATI, Inc. v. Ruder & Finn, Inc.*, 42 NY2d 454, 458 [1977]). Under modern pleading theory, which permits alternative pleading, one

can plead prima facie tort in the alternative with a traditional tort; but once a traditional tort is established, the cause of action for prima facie tort disappears (*Board of Education of Farmingdale Union Free School District v. Farmingdale Classroom Teachers Ass'n., Inc., Local 1889, AFT AFL-CIO*, 38 NY2d 397 [1975]; *Curiano v. Suozzi*, 63 NY2d 113 [1984]). Moreover, an essential element of a cause of action for prima facie tort is special damages (*Curiano v. Suozzi, supra*; *Burns, Jackson, Miller, Summit & Spitzer v. Lindner*, 59 NY2d 314 [1983]). Special damages must be alleged with sufficient particularity to identify actual losses (*Lincoln First Bank of Rochester v. Siegel*, 60 AD2d 270, 280 [4th Dept. 1977]; *John C. Supermarket, Inc. v. New York Property Insurance Underwriting Ass'n.*, 60 AD2d 807 [1st Dept. 1978]). Damages pleaded in round sums, without any attempt at itemization, do not satisfy the required allegation of special damages (*Leather Development Corp. v. Dun & Bradstreet, Inc.*, 15 AD2d 761 [1st Dept. 1962], aff'd. 12 NY2d 909 [1963]).

In the case at bar, in view of the fact that there is a traditional cause of action—defamation—and, more important, in view of plaintiff's failure to adequately allege and set forth special damages with particularity, that branch of defendant's motion seeking summary judgment dismissing plaintiff's cause of action for prima facie tort is granted and it is dismissed.

Settle order.

DATED: August 6, 1987

/s/
J. S. C.

OPINION OF THE APPELLATE DIVISION
OF THE SUPREME COURT OF NEW YORK,
FIRST JUDICIAL DEPARTMENT
(January 17, 1989)
145 A.D.2d 114, 537 N.Y.S.2d 129

SUPREME COURT, APPELLATE DIVISION
First Department, December 1987

Francis T. Murphy, P.J.
Joseph P. Sullivan
David Ross
Ernst H. Rosenberger
George Bundy Smith, JJ.

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Immuno AG,

Plaintiff-Respondent,

31557

against

J. Moor-Jankowski,

Defendant-Appellant

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Appeal by the defendant-appellant from an order of the Supreme Court, New York County (Beatrice Shainswit, J.), entered on August 17, 1987 which, inter alia, denied its motion for summary judgment.

Raymond S. Fersko, of counsel (Anders R. Sterner, Mitchell Lapidus and Cynthia J. Leinwand, with him on the brief; Tanner Gilbert Propp & Sterner, attorneys) for the plaintiff-respondent

Robert G. Sugarman, of counsel (Philip A. Byler and Kenneth L. Bressler with him on the brief; Weil, Gotshal & Manges, attorneys) for the defendant-appellant

Michael S. Zachary, of counsel (Moses & Singer, attorneys), on behalf of the New York Civil Liberties Union, as *amicus curiae*

Henry R. Kaufman, attorney for World Wildlife Fund, as *amicus curiae*

Laura M. Mattera, attorney for the Sierra Club, Humane Society of the United States, American Society for the Prevention of Cruelty to Animals, Animal Protection Institute of America, Animal Welfare Institute, United Action for Animals, Friends of Animals and International Wildlife Coalition, as *amici curiae*

MURPHY, P.J.:

This libel action was commenced in December, 1984 against numerous defendants only one of whom, the appellant Dr. Jan Moor-Jankowski, has managed to remain in the action to seek a determination on the merits.

The plaintiff, Immuno, A.G. (hereinafter Immuno) is an Austrian based corporation with related corporate entities in some thirty countries. Immuno manufactures biologic products derived from blood plasma. These products are tested for safety and efficacy on chimpanzees, the only primates suitable for such purposes.

Defendant Moor-Jankowski is a universally acknowledged authority on the use of primates in biomedical research. He is professor of medical research at the New York University Medical School and Director of New York University Medical School's Laboratory for Experimental Medicine and Surgery in Primates (LEMSIP). He is also Director of the World Health Organization Collaborating Center for Hematology of Primate Animals and the editor-in-chief of the Journal of Medical Primatology.

In December, 1983, Moor-Jankowski caused to be published in the Journal of Medical Primatology a letter to the editor by Dr.

Shirley McGreal.[1] Dr. McGreal is the chairwoman of the International Primate Protection League (IPPL). The IPPL is an organization which has advocated strenuously, and often effectively, for the humane treatment of primates, particularly those used in biomedical research. Dr. McGreal's letter was sharply critical of a proposed plan by plaintiff Immuno to build a medical research facility in the West African nation of Sierra Leone. The text of the letter follows:

"A Project with Potential to Spread
Non-A/Non-B Hepatitis in West Africa"

The International Primate Protection League has learned with concern of proposals submitted by Immuno AG Company of Austria to the Government of Sierra, Leone, West Africa, regarding the company's plans to establish a chimpanzee research facility in Sierra Leone, West Africa.

According to a statement dated August 23, 1982 submitted to the Government of Sierra Leone by Klaus Bieber, Austrian Consul in Sierra Leone, the animals would be used in hepatitis non-A, non-B research and testing of hepatitis B vaccine. The purpose of establishing the facility in Africa was stated to be 'to avoid the problems involved with the importation of live chimpanzees.' Presumably, these "problems" include national and international laws and treaties regarding the movement of live animals belonging to endangered species. The chimpanzees *Pan troglodytes* is listed in Appendix I of the Convention on International Trade in Endangered Species.

Besides getting round restrictions on the international movement of chimpanzees, cheapness of wild-caught chimpanzees appears to be a motivating factor for the Immuno Company. According to the Austrian newspaper *Presse* (February 3, 1983), Immuno Official Johann Eibl stated that captive breeding of chimpanzees was not an economically viable proposition.

The proposed facility would procure 60-80 chimpanzees per

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[1]Dr. McGreal is not a medical doctor. She has a D.Ed. degree.

year, to be obtained from the wild. However, according to Bieber's statement, it must be emphasized that the research will not bring about a decimation of chimpanzees: on the contrary, their numbers would remain stable. Readers familiar with the destructive method by which chimpanzees are caught (killing of mothers in most cases) may be surprised at this statement. However, Bieber cheerfully explains the nondetriment theme by saying,

> Because, after going through a research circle of about 3 years, the animals will be in perfect condition and ready for rehabilitation into the wild.

The International Primate Protection League is concerned over Immuno's plans on many grounds; to cite just a few of them:

> 1. Release of chimpanzee "veterans" of hepatitis non-A, non-B research would be hazardous to wild populations, as there is no way to determine that an animal is definitely not a carrier of the disease. Should release of carrier animals occur, hepatitis could well spread among wild chimpanzees over large parts of Africa. Thus chimpanzees could well become a reservoir for hepatitis just as bats are a reservoir for rabies. The result might be increased human persecution of chimpanzees.
>
> 2. Although chimpanzee rehabilitation has acquired a certain "chic," it is well known that wild chimpanzees attack introduced newcomers. For this reason, chimpanzees in the Mount Asserik project in Senegal directed by Stella Brewer had to be recaptured and released on islands in the River Gambia with no resident chimpanzees. As yet, no permanent home has been located for these animals. The rehabilitation procedures take many years per animal and are extremely costly and hence not feasible on the scale that would be required to start 60-80 animals per year on rehabilitation. Assuming a 5-year training per animal, there could be up to 400 animals undergoing rehabilitation at any given time, at the cost of millions of dollars annually. It is questionable whether, in spite of the most dedicated efforts, any rehabilitated chimpanzees will become totally normal, since they are usually re-

moved from the wild at 1-2 years of age and thus miss the most critical years of their social development.

3. Capture of wild chimpanzees for research is in clear violation of the World Health Organization's 1982 statement on the procurement of primates for biomedical research. Chimpanzees are listed in the Red Data Book of the International Union for the Conservation of Nature as "vulnerable." The WHO statement "strongly recommends" that

> endangered, vulnerable, and rare species be considered for use in biomedical research projects only if they are obtained from *existing* [emphasis added] self-sustaining captive breeding colonies (i.e., captive-breeding all animals required to at least the F-2 generation).

4. Currently, there are over 1000 chimpanzees in US laboratories, as well as large numbers in the Netherlands, Poland, Liberia, etc. These animals should be enough to supply any legitimate requirements for chimpanzees.

The International Primate Protection League shares the scientific community's concern over hepatitis. However, we feel that a way can and must be found to solve this problem without recourse to the dwindling populations of wild chimpanzees. Therefore, we appreciate the opportunity to draw this situation to the attention of interested parties.

Shirley McGreal, MD
Chairwoman
International Primate
Protection League
P.O. Drawer X
Summerville, SC 29483

The letter was prefaced with an editorial note by Moor-Jankowski explaining the circumstances under which it had come to be published. A draft of the McGreal letter had first been received by Moor-Jankowski in January, 1983. Shortly thereafter, in February, 1983, Moor-Jankowski sent a copy of the draft letter

to Dr. Hans Eibl of Immuno, requesting comments or a reply letter. Immuno referred the matter to its New York attorneys who wrote Moor-Jankowski in March, 1983, demanding access to the documents upon which McGreal had relied in composing her letter and threatening legal action if the letter was printed before an opportunity for meaningful response was provided. Moor-Jankowski refused Immuno's request for McGreal's source material, but extended the deadline for a response from Immuno until April 20, 1983. The letter was eventually published in December, 1983, nearly a full year after receipt of the draft, and after articles had appeared in the Austrian press apparently confirming much of what McGreal said.

Prior to publication of the McGreal letter, in October, 1983, an article entitled "Loophole May Allow Trade in African Chimps" appeared in New Scientist magazine. The article's author, Nancy Heneson, had interviewed Moor-Jankowski concerning the proposed Immuno project and reported that he had condemned the project terming it "scientific imperialism." Moor-Jankowski expressed to Heneson his concern that Immuno's attempt to circumvent treaty restrictions on trade in endangered species would reflect poorly on others, himself included, engaged in biomedical research using chimpanzees. He also offered the view that the World Health Organization would soon find it necessary to take a stand on the Immuno project since the project apparently conflicted with WHO policy respecting the use of endangered, vulnerable and rare species in biomedical research. As noted in the McGreal letter, the recommended WHO policy was that members of endangered, vulnerable and rare species were not to be used as research subjects unless they were obtained from "existing self-sustaining breeding colonies." Moor-Jankowski indicated to Heneson that there were enough chimpanzees in captivity to meet research requirements.

It is Immuno's claim in this action that the McGreal letter and the statements attributed to Moor-Jankowski in the New Scientist article are libelous. The claim has been pursued with great vigor, and by the time the present motion by the defendant for summary judgment was submitted the record had grown to over 4000 pages. After a thorough review of this lengthy record, we conclude that the statements contained in the letter and New Scientist article are not actionable and that the defendant is entitled to summary

judgment dismissing the complaint.

The common law of libel provides a plaintiff with a means to recover for injury to reputation caused by statements which are both false and defamatory. Although false, the statements must purport to be factual for expressions of opinion are constitutionally protected and hence nonactionable. *(Gertz v. Welch*, 418 US 323, 339-49; *Rinaldi v. Holt, Rinehart & Winston*, 42 NY2d 369, 380; *Steinhilber v. Alphonse*, 68 NY2d 283, 289.)

In denying defendant's motion for summary judgment, the court held, "It is clear that the statements complained of by the plaintiff, if false, are actionable defamations." Necessary to this broad holding was the court's determination that the statements about which Immuno complained were factual and, therefore, undeserving of the constitutional immunity afforded expressions of opinion. The court observed, "One cannot read the complained-of statements without coming away with the abiding understanding that defendant was making factual charges disparaging plaintiff's scientific activities—*inter alia*, as a fact, defendant was charging that plaintiff was risking a hepatitis epidemic in West Africa, cynically planning to shoot large numbers of chimpanzee mothers at periodic intervals in order to obtain juvenile chimpanzees for its own purposes, and violating through subterfuge, an international convention for the protection of chimpanzees. It would be playing a game of semantics to endow these factual charges with the cloak of opinion."

We think that the court's analysis was flawed in several respects. First, we disagree with the court's rather abrupt conclusion that the statements at issue were entirely factual. Although the McGreal letter did contain some assertions of a factual sort, it would seem plain that its ultimate objective was to express certain opinions which, while highly critical of plaintiff's proposal, did not rise to the level of outright accusations of wrongdoing. It was, moreover, the case that the factual assertions upon which McGreal's opinions rested were evidently true; although it had a more than adequate opportunity to do so, plaintiff did not in opposition to defendant's summary judgment motion adduce evidence of falsity sufficient to warrant the motion's denial. Contrary to the assumption which seemed to inform the court's opinion, the truth or falsity of the assertions made in the McGreal

letter was not a matter necessarily to be reserved for trial. The extensive record before the court indicated quite clearly that plaintiff would not be able to sustain the claim necessary to the proof of its case that the McGreal letter's factual content was false.

It was in *Gertz v. Robert Welch, Inc.*, 418 US 323, 339-40, *supra*, that Justice Powell writing for the Court stated, "[U]nder the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." (Id. at 339-40.) From this dictum has sprung a considerable body of decisional law in which courts have sought to determine whether allegedly defamatory statements are to be deemed expressions of opinion privileged under the First Amendment, or statements of a factual sort possibly outside the First Amendment's protective scope. (*See, Ollman v. Evans*, 750 F2d 970, 975 n6 *cert denied*, 471 US 1127; *see also e.g., Steinhilber v. Alphonse, supra; Parks v. Steinbrenner*, 131 AD2d 60.) The determination has been thought one best left to the court rather than the jury since, as has been often remarked, the line separating fact from opinion is frequently difficult to discern. (*See e.g., Steinhilber v. Alphonse, supra* at 290; *Ollman v. Evans*, supra at 978.) Whether language has as its principal purpose the transmission of a viewpoint or purports to represent a true state of affairs depends not only upon the words chosen but upon the context in which they are employed. The task set the court then is a delicate one requiring sensitivity both to literal signification and to the way in which a statement will be understood. To be sure, literal meaning, to the extent it is ascertainable, has a bearing upon the way in which an expression is understood, but the relationship is subject to varying degrees of attenuation depending upon the tone employed by an author or the author's evident use of exaggeration or understatement. While there exists no absolutely definitive test to guide courts in distinguishing what will be understood as opinion from what will be understood as fact, the inquiry has not been thought entirely resistant to analysis. Indeed, the inquiry has been committed to the courts precisely because it is one requiring an analytic approach if it is to be addressed with some measure of consistency and predictability. (*See Ollman v. Evans, supra* at 978.) It must not be forgotten that in articulating the boundaries separating fact from opinion courts

concern themselves not with a narrow semantic inquiry but with one having a profound constitutional dimension; we determine no less than what may and, to a degree, what may not be freely said. In a society such as ours dependent upon and committed in a fundamental way to the free exchange of information and ideas, it is vitally important that those who would speak and write not be deterred from doing so because of uncertainty over whether they will come within the First Amendment's protective ambit. It is then generally agreed that in sorting fact from opinion courts should employ some analytic criteria and that those criteria should be applied so as not to restrict unduly the range of free expression. (*See, supra,* at 991.)

The question ultimately to be answered in assessing whether a statement is one of opinion or fact is how it would be perceived by an average member of the audience to whom it is directed. (*Steinhilber v. Alphonse, supra,* at 290; *Parks v. Steinbrenner, supra,* at 63.) Although, as noted, there is no definitive, universally applicable set of criteria to be employed in addressing this question, courts have found it useful to focus upon the language used to see if it has a precise meaning capable of objective verification. It has also been thought useful to examine the immediate context in which a complained of statement is presented to ascertain whether the form and content of the communication as a whole would alert the reader or listener to the circumstance that what is being expressed is opinion rather than fact. And, going beyond the statement itself and the immediate setting in which it is presented, courts have considered the broader social context to ascertain the manner in which that context may affect the average reader's or listener's perception of a statement as being either one of fact or opinion. These considerations were the subject of an extensive scholarly presentation by Judge Starr in his well known plurality opinion in *Ollman v. Evans* (750 F2d 970, *cert denied* 471 US 1127), *supra*, and their utility has since been favorably commented on by the Court of Appeals (*see, Steinhilber v. Alphonse,* 68 NY2d 283, 292, *supra*), and this court (*see, Parks v. Steinbrenner,* 131 AD2d 60, 63, *supra*). While they constitute no more than general guides to inquiry the individual importance of which will vary depending on the facts of each case, they should not be dispensed with lightly, and especially not in favor of a court's subjective sense of what is and is not factual. The question of whether a statement is one of fact or opinion is after

all to be dealt with as a matter of law and requires in its address the application of some reasonably objective, even if general, criteria. (*See, Ollman v. Evans, supra,* at 978.)

It would seem that the universe of expression has been divided for the purposes of libel law analysis between the realms of fact and opinion. Although opinion enjoys absolute constitutional immunity, statements of a factual sort do not. Nevertheless, liability for a defamatory statement of fact is not automatic; a true statement cannot be the basis for a libel plaintiff's recovery. Truth is, of course, a principal object of discourse in a free society its ascertainment being indispensable to the beneficial exercise of individual, but even more importantly, collective judgment. Indeed, there can be no doubt that the right of the public to know what is true must take precedence over an individual's right to recover for a damaging remark. What has been more controversial is who should bear the burden of proving truth or the lack of it.

Although it was the case at common law that good repute was presumed as was the falsity of a statement damaging to a person's name, and that it was therefore left to the defendant to prove as an affirmative defense that the complained of statement was true (*see, e.g.*, Prosser, Torts [4th ed], §116, p 798; Seelman, Law of Libel and Slander in New York, pars 170, 392 [rev ed]), there are certain kinds of cases in which that is no longer the rule. The demise of the common law presumption of falsity may be traced to *New York Times v. Sullivan,* 376 US 254 where the Supreme Court held that a public official may not prevail upon a defamation claim unless the defendant's actual malice is demonstrated with convincing clarity (*supra* at 283; *see also, Garrison v. Louisiana,* 379 US 64; *Curtis Publishing Company v. Butts,* 388 US 130.) Implicit in the New York Times holding was the requirement that the public figure plaintiff prove falsity, for the actual malice standard entailed a showing of the defendant's calculated use of falsehood. As this state's Court of Appeals observed, "[A]lthough there has been doubt (citation omitted), the burden is now on the libel plaintiff to establish the falsity of the libel. (*Cox Broadcasting Corp. v. Cohn,* 420 US 469, 490.) This requirement follows naturally from the actual malice standard. Before knowing falsity or reckless disregard for the truth can be established, the plaintiff must establish that the statement was, in fact, false." (*Rinaldi v.*

*Holt, Rinehart*, 42 NY2d 369, 380, *supra*)

In *Gertz v. Robert Welch, Inc.* (*supra* at 345), of course, the Supreme Court recognized that the states retained "substantial latitude" to prescribe the level of culpability necessary to sustain a libel action brought by a private figure plaintiff, thereby permitting such a plaintiff to prevail on something less than a showing of actual malice. The New York Court of Appeals exercised this "substantial latitude" in *Chapadeau v. Utica Observer* (38 NY2d 196) stating, "where the content of the article is arguably within the sphere of legitimate public concern, which is reasonably related to matters warranting public exposition, the party defamed may recover; however, to warrant such recovery he must establish, by a preponderance of the evidence, that the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties." (*Supra* at 199.) Although *Chapadeau* allowed a private figure plaintiff to recover upon a showing of fault less demanding than that constitutionally required of public figure plaintiffs, New York Courts held that the standard of culpability articulated in *Chapadeau, i.e.* gross irresponsibility, still necessitated the plaintiff's proof of falsity: "We see no significant distinction where the plaintiff is held to be a private figure and the topic of the article is a matter of public concern. In such cases the plaintiff is required to prove gross irresponsibility (***) resulting in a defamatory falsity. Under such circumstances, proof of falsity is again naturally related to the standard of care. Thus, in a case with constitutional implications such as the one at bar, the defamed plaintiff must prove falsity, irrespective of his status (*see Wilson v. Scripps-Howard Broadcasting Co.*, 642 F2d 371)." (*Fairley v. Peekskill Star*, 83 AD2d 294, 297.) That this approach was correct and, indeed, constitutionally mandated, at least where media defendants were concerned, became apparent after the decision of the Supreme Court in *Philadelphia Newspapers, Inc. v. Hepps* (475 US 767). There, the Court held "the common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern." (*Supra* at 777.) Recognizing that there would be cases in which a media defendant might have great difficulty proving the truth of a statement even though it was in fact true the Court observed, "placement by state law of the burden of proving truth upon media

defendants who publish speech of public concern deters such speech because of the fear that liability will unjustifiably result. ... Because such a 'chilling' effect would be antithetical to the First Amendment's protection of true speech on matters of public concern, we believe that a private-figure plaintiff must bear the burden of showing that the speech at issue is false before recovering damages for defamation from a media defendant. To do otherwise could only result in a deterrence of speech which the Constitution makes free. *Speiser v. Randall*, 357 US 513, 526." (*Supra*, 475 US, at 777.)

There is no question that the present defendant is a media defendant, nor is there question that the speech at issue is at least "arguably within the sphere of legitimate public concern. (*Chapadeau v. Utica Observer-Dispatch*, *supra* at 199.) Plaintiff concedes as much when it urges that it is a "private figure, subject to the grossly irresponsible standard," thus acknowledging the existence of conditions warranting Chapadeau's application to the facts at bar. But even if the concession had not been made, we would have no difficulty finding that the McGreal letter contained speech of public concern. Plainly, the plans of a party to undertake a course of activity which would possibly frustrate efforts of the international community to safeguard an endangered species, are of public concern. This and the media status of the defendant being beyond dispute, *Philadelphia Newspapers*, *supra*, dictates that plaintiff must prove that the defamatory statements are false if it is to prevail.

The allocation of the burden of proof dictated by *Philadelphia Newspapers*, *supra*, has the consequence that a libel plaintiff opposing a motion for summary judgment must come forward with proof in evidentiary form sufficient to generate a triable issue as to the offending statement's falsity. If no such proof is offered, the defendant is entitled to prevail. (*See, Rinaldi v. Holt, Rinehart & Winston, supra*, at 382; *Pollnow v. Poughkeepsie Newspapers, Inc.*, 67 NY2d 778, 779; *see also Brady v. Ottaway Newspapers*, 84 AD2d 226, 242-43; *Fairley v. Peekskill Star Corp.*, *supra*, at 297.)

The importance of summary adjudication in the context of libel litigation cannot be overemphasized. Libel actions are notoriously expensive to defend and, indeed, "[T]he threat of being put to the

defense of a lawsuit ... may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself." (*Washington Post Co. v. Keogh*, 365 F2d 965, 968 [J. Skelly Wright, J.] *cert denied* 385 US 1011). While the threat of defamation actions cannot be eliminated so long as states consistent with their traditional and worthy concern for personal reputation continue to afford victims of libel and slander civil recourse, it has been thought desirable and necessary to the ends served by the First Amendment to limit the circumstances under which recovery may be had and, in so doing, to encourage pretrial disposition of all but those lawsuits involving defamatory speech susceptible of being proved false, culpably uttered and damaging. Thus, the cases following in the wake of *New York Times* and *Gertz*, *supra*, have mandated the summary dismissal of libel actions based on non-factual statements and have, through the imposition of stringent standards of fault and the reallocation of evidentiary burdens on the issue of falsity, rendered libel actions—particularly those involving speech of public concern and public figure plaintiffs—ever more vulnerable to early dismissal. Whether these constitutionally based limitations upon the availability of a remedy for defamation have been successful in diminishing the threat posed free expression by proliferating lawsuits is a subject of ongoing debate. It is, however, certain that if their motions for summary judgment are erroneously denied, libel defendants will not be substantially better off than they were at common law before the era of First Amendment jurisprudence ushered in by *New York Times v. Sullivan*, *supra*. To unnecessarily delay the disposition of a libel action is not only to countenance waste and inefficiency but to enhance the value of such actions as instruments of harassment and coercion inimical to the exercise of First Amendment rights. Thus it has been recognized that "[I]n the First Amendment area, summary procedures are even more essential [than in other kinds of litigation]. For the stake here, if harassment succeeds is free debate." (*Washington Post Company v. Keogh*, *supra*, at 968.) For this reason the courts of this state have repeatedly instructed against reluctance in the application of the ordinary rules governing summary judgment in libel cases. (*See e.g.*, *Karaduman v. Newsday, Inc.*, 51 NY2d 531, 545; *Gaeta v. New York News*, 62 NY2d 340, 351; *see also Rinaldi v. Holt, Rinehart & Winston*, *supra*, at 384; *Freeze Right Refrig. & Air Conditioning Servs. v. City of New York*, 101 AD2d 175, 181.)

That the motion court in this case was evidently reluctant to apply the ordinary summary judgment criteria, and apparently indicated its indisposition even to entertain a summary judgment motion is regrettable. It is disturbing that the plaintiff had, by threatening legal action, managed to delay publication of the McGreal letter for almost a year, and that it succeeded in coercing what the motion court referred to in its decision as "substantial settlements from all but one of the original defendants for the obvious reason that the costs of continuing to defend the action were prohibitive. It is, however, particularly unfortunate the one remaining defendant was not granted the summary relief to which he was so clearly entitled, for the careful examination of the record required of us especially in libel actions (*see, Rinaldi v. Holt, Rinehart & Winston, supra* at 384), leads unavoidably to the conclusion that none of the statements about which the plaintiff complains are actionable.

Before turning in detail to the substance of the McGreal letter, certain general observations regarding the context in which the letter was published are in order. The Journal of Medical Primatology is a publication directed at a highly specialized group of readers. Its subscribers are, almost without exception, medical doctors, researchers, and the medical and science libraries of academic institutions. The scientific studies published in the Journal are of a formal and technical sort. It must be presumed that those who consult the Journal are not novices in the field of medical primatology and that they bring to their reading a well developed understanding of the issues facing biomedical researchers using primates as research subjects. Aside from their specialized knowledge, the Journal's readers, a group largely comprised of those with advanced scientific training, must be presumed skilled in the dispassionate evaluation of information and argument.

McGreal's remarks were presented to this sophisticated readership in the relatively modest format of a letter to the editor; there was absolutely no attempt to vest the letter's contents with the trappings of objectivity and authority reserved in other parts of the Journal for articles presenting scientific findings. The common expectation of a letter to the editor is not that it will serve as a vehicle for the rigorous and comprehensive presentation of factual matter but as one principally for the expression of individu-

al opinion. Surely, this expectation was not defeated in this case. The limited factual basis for Dr. McGreal's conclusions was immediately evident from the letter's text, and indeed it is the hallmark of "pure opinion" that it is accompanied by a recitation of the facts upon which it is based. (*See Steinhilber v. Alphonse, supra*, 68 NY2d, at 289; *see also*, Restatement [Second] of Torts §566 comments b and c.) This is because when stated facts are merely supportive of and do not require a conclusion, it must be thought that the conclusion is in the nature of comment or opinion; the claim made is not that the comment must be true, but that it represents the view most persuasively justified by the facts at hand. It would have been particularly evident to the Journal's readers that McGreal's conclusions as to the advisability of the Immuno proposal were no more than opinions. Certainly, the Journal's readers would not have confused her predictive assertions respecting the risks of the Immuno proposal for matters of fact.

The editorial note preceding the letter underscored the circumstance that the views expressed in the letter were McGreal's and the letter itself repeatedly spoke in cautious terms of its author's "concerns." It was moreover clear that McGreal's concerns were those of an animal rights activist. The letter and the prefatory editorial note both drew the reader's attention to the fact that McGreal was Chairwoman of the International Primate Protection League. In this capacity she had become well known as a staunch advocate for strict limitations on the use of primates in biomedical research. The Journal's readers were well aware of this. Indeed, some of them, defendant Moor-Jankowski included, had been past targets of her criticisms. They would have understood that Dr. McGreal's comments as to the advisability of a research project such as that proposed by Immuno were likely to reflect in some measure her general inclination to look askance at proposals for research involving chimpanzees. The debate between animal welfare activists and proponents of research involving animals as research subjects had been underway for years at the time the McGreal letter was published. It was a debate whose tone had not always been moderate and in the course of which exaggerated pronouncements were not uncommon; the rhetoric often belied the complexity of the underlying scientific and ethical issues. Had Dr. McGreal actually made factual charges of the sort the motion court thought would be understood from her letter (*see, supra,at 118-*

*120*), we think that they would, in light of the tone of the larger debate, have been viewed as little more than overstatements reflective in considerable part of their author's well known biases. As it was, however, the letter was, although sharply critical, quite careful to distinguish between fact and comment. That Dr. McGreal's observations upon the cited facts did not reflect well upon Immuno is clear, but that they were her observations and did not purport to be matters of fact is also clear. As such, they cannot support a recovery for defamation. Regarding the underlying factual propositions, as we shall see, those were, on the extensive record before us, either demonstrably true, or apparently insusceptible of being proved false, and in either event non-actionable.

Some factual background is necessary in order properly to evaluate the letter's various assertions.

To begin, it is not disputed that in April, 1982, the Austrian government ratified the Convention on International Trade in Endangered Species (CITES). As is here relevant, CITES provides, "The import of any specimen of a species included in Appendix I [chimpanzees are so included] shall require the prior grant and presentation of an import permit and either an export permit or a re-export certificate. An import permit shall only be granted when the following conditions have been met *** (c) a Management Authority of the State of import is satisfied that the specimen is not to be used for primarily commercial purposes." Soon after CITES was ratified by the Austrian legislature, Immuno which had been conducting its research in Austria using imported chimpanzees, initiated inquiries to establish a research center in Sierra Leone using chimpanzees native to that country's forests.

Klaus Bieber, the Austrian Honorary Consul in Sierra Leone, states in his affidavit that he met with representatives of Immuno in Vienna in July, 1982. He was at that time instructed to take all necessary steps on Immuno's behalf to facilitate the establishment of a biomedical research center. For his efforts, it was agreed that Bieber would receive an "honorarium" of $1000 every six months. Bieber labored in Immuno's behalf for approximately two years. He evidently brought the proposed project to the attention of highly placed Sierra Leone government officials and arranged ministry level meetings at which Immuno s representatives could

present their proposal directly to the authorities whose approval was required for the project to go forward. Apparently sensitive to issues of protocol, Bieber notes in his affidavit that he advised Immuno that once the project was approved and underway it would be appropriate to give the Sierra Leone president a "nice gift"; he thought a chandelier would do.

Bieber acknowledges in a letter to Shirley McGreal dated March 8, 1983, that on August 23, 1982, he authored a document describing the proposed Immuno project. The document whose obvious purpose was to explain the project to Sierra Leone government officials is titled "Hepatitis Research Institute." It states that the research to be conducted with chimpanzees at the institute would include the development of inactivation procedures for Non-A/Non-B hepatitis viruses in plasma fractions and the testing of hepatitis B as well as Non-A/Non-B vaccines. The reason for choosing Sierra Leone as the site for the research facility is frankly set forth: "To avoid problems involved with the importation of live chimpanzees, Immuno AG has decided to set up a research facility in West Africa, as the source of the animals, and Sierra Leone is its first choice." The document then seeks to reassure that the research will not cause the decimation of the wild chimpanzees to be captured and used as research subjects since the animals are to be rehabilitated after a three year "research circle" and returned to the wild in "perfect condition." According to the document, the proposed research institute's intake will be approximately 60 to 80 chimpanzees per year. Sierra Leone government approval is thus sought "to permit the company to obtain the necessary number of chimpanzees to carry on research."

Sierra Leone government documents whose authenticity and accuracy are not disputed by Immuno, confirm that the above described proposal was formally presented to Sierra Leone ministry officials by Immuno representative Gerald Eder at a meeting held at the Sierra Leone Ministry of Forestry and Agriculture on April 18, 1983. On April 20, 1983, Dr. Abass Bundu, the Sierra Leone Minister of Agriculture, reported to the Secretary to the President on the discussion of the Immuno proposal which had transpired at the meeting two days before. Dr. Bundu explains that the research conducted at the proposed center would seek to "develop inactivation procedures of Non-A/Non-B plasma fractions, and to "prove the potency and safety of

the hepatitis B as well as of the Non-A/Non-B hepatitis vaccines." As is here relevant, Dr. Bundu's report went on to indicate that Immuno had asked to be provided with 60 to 80 chimpanzees a year. Dr. Bundu had expressed reluctance to furnish so large a number and proposed instead that Immuno initially be given 50 to 60 animals to begin small scale research while starting a breeding farm from which it would obtain its supplies in future years. In this connection, Dr. Bundu noted, "[i]ncidentally, the main reason why the Austrians are proposing to establish the centre in Sierra Leone is precisely because they would not otherwise be able to import chimpanzees into Austria by virtue of the Washington Agreement for the Protection of Endangered Species in Flora and Fauna [CITES] to which Sierra Leone and Austria are both signatories." Bundu was skeptical about Immuno's rehabilitation plans observing: "The company had in mind transferring the chimpanzees after the experiment to some isolated uninhabited island for rehabilitation purposes. We did not think this was a sound proposal: first, wild animals domesticated normally do not revert to their natural habitat easily, nor are they usually accepted back by their own kind. In fact their fate is invariably death; second, putting them on an island would be tantamount to founding a new animal colony entirely for the returners—an environment which would certainly not be natural; thirdly, there is the risk of transmission of viruses acquired during the experimentation; and finally there are no isolated uninhabited islands as such since nearly all our islands are frequently visited by artisanal fishermen. For all these reasons, we rejected the idea and suggested instead that a breeding farm be established by the Centre."

These reservations notwithstanding, Bundu recommended that the project be approved, in principle.

Keeping the above recounted factual background in mind it is appropriate now to return to the alleged "libel letter" to evaluate the nature of the assertions there made.

First, there can be no doubt that the letter accurately reported that Immuno intended to establish a research center in Sierra Leone. The letter also accurately stated the contents of the August 23, 1982, Bieber document describing the proposed project and its objectives. As to the letter's observations concerning Immuno's

motives for locating the research center in Sierra Leone, these were not presented as matters of fact but as interpretations of Immuno's conduct justified by certain stated facts. It was, after all, true that the strict import and export restrictions imposed by CITES threatened to cut off Immuno's supply of wild caught chimpanzees for use in its Austrian laboratories. It was also true that Dr. Johann Eibl of Immuno had stated in the Austrian press that captive breeding of chimpanzees was not economically viable. Under these circumstances it was fair to conclude that Immuno wished to get around the CITES restrictions and was situating the facility in Sierra Leone with that purpose in mind. That was, of course, precisely the conclusion drawn by Dr. Bundu after listening to Dr. Eder's April 18, 1983, presentation. Indeed, Dr. Eder in a letter dated January 12, 1983, addressed to Franz Sitter, a renowned, and in some quarters, infamous, chimpanzee dealer with whom Immuno had transacted extensive business, acknowledged Immuno's concerns: "We think that there is hardly any chance that we will be allowed to import the animals necessary for our experiments to Austria before long. There are various reasons for this. On the one hand, the authorities either do not want to permit the importation due to a wrong conception of environmental protection or the respective purviews of responsibility are not clearly defined when it comes to issuing an import permit. On the other hand, the excessive prices charged for chimps call the economic feasibility of this type of venture into question. For this reason we have planned to carry out such a project in Africa itself with the intention that it should be conducted at the highest possible level."

The CITES Secretariat, the international body responsible for overseeing the treaty's administration, also viewed the plans of Immuno as an attempt to avoid the treaty's trade restrictions. In a letter dated February 15, 1984, the Secretariat stated: "As noted in our letter of 12 October 1983, the project appears to be an attempt to circumvent the restrictions imposed by CITES. Immuno wish [*sic*] to import chimpanzees into Austria but are restrained from doing so by Austria's accession to and implementation of CITES. Thus, the attempt to establish a centre in Sierra Leone can only be reasonably interpreted as an effort to avoid the effects of CITES. ... the project is apparently a deliberate attempt to circumvent the provisions of the Convention."

In any case, the issue before us is not, as it would have been at common law, whether Dr. McGreal's comments concerning Immuno's motives were fair (*see*, Restatement [Second] of Torts § 566, comment b), and it would appear that they were eminently fair, but whether they were statements of opinion, and about that there can be no doubt. Inquiry as to motivation is generally absolutely privileged (*see Rinaldi v. Holt, Rinehart & Winston, supra,* 42 NY2d, at 382), for motivation is ordinarily hidden from view and it is, therefore, understood that most statements concerning motivation do not proceed from certain knowledge but from the observation and interpretation of conduct. The present case is no exception. Dr. McGreal did not pretend to know conclusively why Immuno wished to establish a research facility in Sierra Leone. Rather, she recited certain facts from which she presumed that the motive was avoidance of the CITES treaty's effect. Her presumption did not exclude the possibility of another more benign motivation, it merely indicated that in the absence of contrary facts it was her opinion that the avoidance of treaty restrictions probably figured prominently in Immuno's decision making. As to her statement that "cheapness of wild caught chimpanzees appears to be a motivating factor for the Immuno Company," this description of what appeared to be the case was plainly an expression of opinion justified by statements made to the Austrian press by Immuno official Johann Eibl (*see, infra,* at 136). It may be observed that had Dr. McGreal at the time she composed her letter known all that has been disclosed in the discovery phase of this litigation, she might quite confidently have charged, as a fact, that Immuno wished to avoid the CITES treaty in order to obtain relatively cheap wild caught chimpanzees for its research. These motives have, of course, been frankly confirmed in the aforecited statements of Immuno officials (*see, supra,* at 131; *infra,* at 136).

Moving now to the fourth paragraph of the letter, McGreal there asserted that the facility proposed in the earlier cited August 23, 1982 statement by Consul Bieber would procure 60 to 80 chimpanzees from the wild annually. McGreal then observed that chimpanzees are in most cases captured by killing mother chimpanzees and thereafter taking the surviving juvenile chimps. She noted with evident skepticism that Bieber had claimed that regular removal of so many chimps from the wild would not lead to their depletion since Immuno planned to rehabilitate the chimps after the research cycle was complete and to return them to the wild in

"perfect condition."

Immuno takes great exception to McGreal's account of its plans. They note that they eventually agreed not to take 60 to 80 wild chimps annually, but to take only 50 to 60 chimps once to meet their needs during their research facility's first year of operation and thereafter to obtain their supply of chimps from a breeding station which they consented to establish near the research facility. While the evidence indicates that Immuno apparently did alter its original proposal at the insistence of Sierra Leone government officials, it is difficult to perceive how this alteration supports Immuno's defamation claim. There is no question that McGreal's letter accurately recited the specifications of the proposal set forth in the August 23, 1982 Bieber statement. There is also no question that the very same proposal was urged upon the Sierra Leone government by Immuno official Gerald Eder as late as April 1983. It is also plain that Immuno would have adhered to its original proposal had the Sierra Leone government not insisted upon the above described concessions. Obviously, McGreal's true report of Immuno's initial proposal, the source and date of which were scrupulously identified by her, cannot support a recovery for defamation.

Particularly perplexing is the claim, implicit in Immuno's argument, that the disclosure of its original proposal was defamatory. It must be stressed that this was Immuno's own proposal. Surely Immuno does not suggest that its very own plan, one which it apparently would have been happy to pursue, was so ill-conceived and so obviously pernicious in its methods and probable consequences that its accurate disclosure caused Immuno reputational injury. If the plan was so clearly misguided the wound which its disclosure is alleged to have caused is self-inflicted and cannot be redressed through the law of libel.

At most, Immuno can claim only that McGreal failed to indicate in her letter that certain Sierra Leone government documents showed that as of April 1983 the original plan had evidently been superseded by one reflecting modifications required by Sierra Leone ministry officials as a condition of recommending the project's approval "in principle." The omission of this information from McGreal's letter was not defamatory. McGreal's criticisms had as their identified target the original proposal. The

letter made no claim that the proposal criticized was the most current plan under consideration.

There was, moreover, good reason for both McGreal and Moor-Jankowski to believe that the original plan had not, despite Immuno's apparent concessions, been conclusively abandoned. In January, 1983, the respected Austrian newspaper Die Presse reported concerning the Immuno project: "There seems to be disagreement among the 'fathers' of the project as far as the breeding of chimpanzees is concerned: While General Consul Harrer confirms that the research institute will also include a breeding station, Immuno's director, Eibl, points out the almost unsurmountable difficulties that prevent a profitable breeding of these animals. According to him, the needed chimpanzees shall all be taken from the wild."

Obviously, there was cause to doubt that Immuno would in April, 1983, easily abandon its intention to obtain its chimps exclusively from the wild, in favor of a breeding plan which Immuno's director, Eibl, had so recently rejected out of hand as fraught with "unsurmountable difficulties." The difficulties with the breeding plan were indeed profound, for as the expert testimony in the record demonstrates with virtual unanimity, the 50 to 60 wild caught juvenile chimpanzees with which Immuno under its revised plan proposed to start its research and breeding would not reach breeding age for about ten years.[2]

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[2]The following deposition testimony by Dr. Alfred Prince, a noted expert in the captive breeding of chimpanzees is particularly revealing:

"Q If you had been told that Immuno did not plan to obtain 60 to 80—if you had read in the letter to the editor of Shirley McGreal, not that Immuno was planning to obtain 60 to 80 chimpanzees in the wild in Sierra Leone, but rather that it was planning to start the center with 50 to 60 chimpanzees, which the government of Sierra Leone would give it, and then start a breeding colony, would you have a different opinion as to intelligence [of the plan]?

"A No, certainly not. ***

"A That would be even more unrealistic. The government of Sierra Leone has no chimps. Dr. Sitter can obtain chimps and would be

(continued...)

Doubts about Immuno's ultimate intentions were also warranted by Immuno's failure publicly to renounce the earlier plan. Indeed, the defendant provided Immuno with an opportunity to clarify its intentions and to correct any misimpressions which the McGreal letter might create. Thus, shortly after receiving the letter, Moor-Jankowski, in February, 1983, forwarded a copy of it to Eibl with a cover letter which read in pertinent part:

"I would appreciate receiving your comment or reply. Depending on what we hear from you we will either publish Dr. Shirley McGreal's letter together with your comments or, if the allegations in her letter can be proved to us to be incorrect we will return the letter to Dr. McGreal declining its publication.

"The Editors-in-Chief of the Journal consider this matter of highest importance in view of the past results of interventions by Dr. McGreal whose visits and negotiations with the former Prime Minister of India, Mr. Desai, resulted in the ban on rhesus monkey exportation which she was able to maintain with Mrs. Indira Gandhi. Dr. McGreal is also credited with the ban on rhesus exportation from Bangladesh. She has successfully interfered with primate animal programs which she considered inhumane in several laboratories both at universities and at NIH. Thus, we cannot take lightly the enclosed letter and I have to ask you to be kind enough to reply so that I may have your response within one month, i.e. before the 10th March as I will not be able to delay the publication of her letter without due cause. It is the policy of the Journal to allow all the concerned parties to take a position in a controversial matter."

Eibl responded on February 22, 1983. He acknowledged receipt of the draft letter but made no attempt to address its content. Rather, he urged the editor-in-chief of the Journal of Medical Primatology to seek Moor-Jankowski's unbiased advice, observing that Moor-Jankowski as head of LEMSIP had "vast

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[2](...continued)

the person to obtain chimps for him. He would obtain little babies. They would then have to wait 10, 12 years until they began to get a trickle of offspring, a very expensive proposition, and it wouldn't satisfy their needs."

experience" in the field of medical primatology and was well aware of its problems. (Eibl was apparently unaware that Moor-Jankowski was the editor-in-chief of the Journal of Medical Primatology.) Referring to the "non-scientific side" of the draft letter, Eibl indicated that that would be brought to the attention of Immuno's New York attorneys.

Less than two weeks later, on March 3, 1983, Immuno's New York counsel wrote to Moor-Jankowski demanding copies of McGreal's source documents. Counsel claimed that no response to the draft letter could be given by Immuno until it had seen the materials upon which McGreal had relied for her information. Immuno's attorneys threatened to take legal action if the letter was published without an opportunity for "meaningful response."

By letter dated March 22, 1983 Moor-Jankowski replied to the March 3 letter. He refused the document request but extended the time for Immuno to submit a response to the draft letter until April 3, 1983. He noted, "I may add that I am astonished by your request in that matter which is not usual in dealing with source material of the press in this country. Moreover, the contention of Dr. McGreal has been reported and confirmed in the Austrian press."

On April 11, 1983, Immuno's attorneys responded to Moor-Jankowski's March 22 letter, again claiming that their client was unable to frame a proper response to the McGreal draft letter without access to its author's source documents. The threat to take legal action if the letter was published was repeated.

As can be seen, though it was afforded what must be regarded as a generous opportunity to clarify its plans, Immuno never did so. Even after it had allegedly changed its initial proposal in April, 1983, it made absolutely no effort to confirm that circumstance to Moor-Jankowski prior to the McGreal letter's December, 1983 publication. It is well to recall that "[T]he first remedy of any victim of defamation is self-help—using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation." (*Gertz v. Robert Welch, Inc., supra*, 418 US, at 344.) Having entirely failed to pursue this "first remedy" which was made so extraordinarily available to it, Immuno is not now in a position to complain. It has, in any event

little to complain about; there has been no lie or error, but merely an apparent, and, under the circumstances, understandable failure by the defendant to present Immuno's research plans in their most current form. We note that Immuno's excuse for failing to avail itself of the opportunity to respond, namely that it could not frame a proper reply without access to McGreal's source material, is nonsensical. No one knew better about Immuno's plans than Immuno itself. If McGreal's assertions were in error or were not current Immuno was in no way disabled from indicating that by its lack of access to McGreal's source material.

The fact which an honest reply from Immuno would have been powerless to alter was that, as the McGreal letter reported, Immuno had entertained and actively promoted a most problematic plan. With the evident purpose of circumventing an international treaty, it had approached the Sierra Leone government and requested to be supplied yearly with 60 to 80 chimpanzees for its research purposes. It has not been seriously disputed in the course of this litigation that, as Dr. McGreal stated, chimps are most often caught by killing their mothers, and it has been estimated that for every juvenile chimp captured, 5 to 10 mothers are killed. Even Immuno acknowledged that its original plan without any ameliorative measures might lead to a further depletion of the already endangered West African chimpanzee population and for this reason proposed to rehabilitate the chimps and return them to the wild. Unfortunately, as Dr. McGreal pointed out, this was not a viable option. Previous attempts to rehabilitate chimpanzees such as the Mount Asserik project in Senegal were very costly and had not been highly successful; there was little reason to suppose that an attempt would succeed in Sierra Leone. Dr. Bundu, it will be recalled, had succinctly summarized the many difficulties standing in the way of a rehabilitation project such as the one proposed by Immuno (*see, supra, at 132-133*), not the least of which was the lack of an appropriate site in Sierra Leone. Indeed, a review of the record fails to disclose any real controversy over the unfeasibility of Immuno's originally proposed plan to return the chimpanzees to the wild.

Although vigorously maintaining that its rehabilitation plan had been abandoned by the time of the McGreal letter's publication, Immuno nevertheless is understandably sensitive to Dr. McGreal's allegation that it contemplated a course of action entailing the risk

of the spread of hepatitis. It will be recalled that Dr. McGreal had stated that the release of research veterans "could well" lead to the dissemination of the non-A/non-B virus among the African chimpanzee population, turning the chimpanzees into a reservoir for hepatitis. The stated basis for this assertion was that there was no test to determine whether an animal was a non-A/non-B carrier. McGreal reasoned that without such a test any plan to release non-A/non-B research veterans would carry with it the risk that non-A/non-B carriers would be among those returned to the wild where they would come in contact with and quite possibly infect other animals. It is quite clear that Dr. McGreal was correct in her observation that there is no way of definitely determining whether an animal is a non-A/non-B carrier. Dr. Alfred Prince, the discoverer of non-A/non-B hepatitis and widely regarded as the preeminent authority on that form of hepatitis, testified at his deposition that the carrier state in chimpanzees who have been infected with non-A/non-B hepatitis is quite common. Dr. Prince stated that minimally 25 to 50% and possibly as high as 75 or even 100% of animals remain non-A/non-B carriers indefinitely after they are no longer actively diseased. Dr. Prince expressly confirmed that, as Dr. McGreal had stated, there is no test to identify the viral agent which causes non-A/non-B hepatitis, and indeed Immuno's own Dr. Eder co-authored an article acknowledging that the virus lacks "generally accepted serological and morphological markers. (4 *Hepatology Mag* 510 [1984]). There is then no real issue as to the accuracy of the factual premise underlying McGreal's concern that undetected non-A/non-B carriers might be released. Immuno urges, however, that although there is no test for the non-A/non-B virus, it is possible to ascertain whether an animal is still infectious, and that it would, therefore, have been possible to prevent the release of infectious chimpanzees, thus removing any risk of the spread of non-A/non-B hepatitis. But, here again, Immuno's plan would seem to have been completely unrealistic, for the test Immuno claims it would have performed to determine whether its former research subjects were still infectious was to inoculate a healthy animal with the blood of a research veteran and see whether the healthy chimp developed hepatitis symptoms. Dr. Prince termed this procedure "expensive," "laborious" and "wasteful," and observed that it would involve the infection of healthy chimpanzees. He noted that the procedure's many drawbacks made its use rare. Under these circumstances, McGreal can hardly be faulted for not assuming

that Immuno would necessarily perform the inoculation procedure on every one of the many chimps it intended to return to the wild. Without any practical means of screening for non-A/non-B carriers, there was certainly some risk reasonably to be perceived in a rehabilitation scheme such as that proposed by Immuno.

The extent of the risk following from the release of non-A/non-B carriers was a matter of opinion. No one could foresee precisely what the consequences would be. As Dr. Prince noted in his deposition testimony and in his letter-to-the-editor responding to Dr. McGreal's letter, there was much that was not known concerning the prevalence and duration of the carrier state and the transmissibility of the non-A/non-B virus among chimpanzees. Certainly, Dr. McGreal did not invite a contrary impression when she spoke of what "could well" happen if carrier animals were released.

We turn now to McGreal's statement that, "[C]apture of wild chimpanzees for research is in clear violation of the World Health Organization's 1982 statement on the procurement of primates for biomedical research." The record shows that the World Health Organization and the Ecosystem Conservation Group[3] had indeed issued a policy statement on the use of nonhuman primates for biomedical purposes. The statement observed in relevant part:

"A total of 76 primate taxa are currently considered endangered, vulnerable or rare by IUCN. Since these taxa are either in serious decline or already at very low and precarious population levels, any exploitation of them threatens their continued survival. Therefore, the ECG and WHO strongly recommend that:

"(1) endangered, vulnerable and rare species be considered for use in biomedical research projects only if they are obtained

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[3]The Ecosystem Conservation Group (ECG) is made up of members from the United Nations Educational, Scientific and Cultural Organization (UNESCO), the United Nations Environment Program (UNEP), the Food and Agriculture Organization of the United Nations (FAO), and the International Union for Conservation of Nature and Natural Resources (IUCN).

from existing self-sustaining captive breeding colonies (i.e., in captive breeding, all animals are required to be at least F2 generation)."

Obviously, Immuno's proposal which, even in its revised form, involved the use of animals listed as "vulnerable" taken from the wild, and which, in any event, did not contemplate the use of animals obtained from "existing self-sustaining captive breeding colonies" would have run afoul of this policy statement. McGreal's assertion was quite simply true. It is not deprived of its validity by Immuno's efforts to magnify it into an accusation of illegality. Viewed fairly, McGreal's assertion does no more than state accurately that Immuno's proposal was not consistent with the policy which had been strongly recommended by the World Health Organization.

In the McGreal letter's penultimate paragraph, it is stated that there are over 1000 chimpanzees in captivity and that these should be sufficient to meet legitimate research requirements. Dr. Eibl of Immuno conceded in his deposition testimony that Dr. McGreal's estimate of the number of chimpanzees in captivity was most probably correct. He also apparently conceded that it was a matter of opinion whether that number was, as Dr. McGreal claimed, adequate to meet legitimate research needs. But even if the concession had not been made it would be hard to view the assertion as anything but opinion. It would have been plain to the Journal's readers that McGreal's notion of what was a legitimate requirement for chimpanzees was bound to be very limited indeed. McGreal was, in fact, well known for her general disapproval of most research involving chimpanzees; for her the welfare of the animals was the predominant concern and her assessment of the legitimacy of research requirements was bound to reflect that concern. No one would have understood her statement—"[T]hese animals [the estimated 1000 in captivity] should be enough to supply any legitimate requirements for chimpanzees"—as the product of an objective and dispassionate evaluation of biomedical research needs. In any case, McGreal did not say, as Immuno now finds it advantageous to claim, that Immuno's requirements were not legitimate, only that to the extent that they were legitimate they could be met without resorting to wild chimpanzee populations. This meaning, which we do not think defamatory, is reinforced in the last paragraph of the letter where McGreal

acknowledges the importance of hepatitis research but urges at the save time that "a way can and must be found to solve this problem [the problem of hepatitis] without recourse to the dwindling populations of wild chimpanzees." It is interesting to note that McGreal's position as to how legitimate research needs should be met was not fundamentally different from that of the World Health Organization in its above quoted statement. Indeed, if anything, McGreal's position was the more moderate one since she did not, like the World Health Organization, recommend that research subjects be limited to second generation captive bred chimps which were exceedingly scarce, but simply advocated that the chimps not be obtained from the wild.

The comments attributed to Moor-Jankowski in the New Scientist article do not require extensive comment. Moor-Jankowski's somewhat colorful use of the expression "scientific imperialism" to describe the proposed Immuno project, the salient features of which had been discussed earlier in the article, was nothing more than a way of expressing a disapproving opinion of what Immuno evidently wished to do. Precisely what "scientific imperialism" is far from clear. It is one of those "loosely definable" or "variously interpretable kinds of expressions which cannot support an action for defamation. (*See, Ollman v. Evans, supra*, 750 F2d at 980.) Manifestly, it would be an altogether pointless exercise to have a jury determine whether Immuno had in fact practiced "scientific imperialism." The statement does not lend itself to verification and cannot, therefore, be regarded as one of fact. (*See, supra,* at 981; *see also Buckley v. Littell,* 539 F2d 882, 895 *cert denied* 429 US 1062.) As for Moor-Jankowski's other comments in the New Scientist article, namely that Immuno's attempt to circumvent treaty restriction would reflect poorly on other researchers and that the World Health Organization would soon find it necessary to take a position on the Immuno project, these too were readily identifiable statements of opinion. The limited factual basis for these opinions was set forth in the course of the article and it would seem highly unlikely that any reader would have mistaken them for assertions of fact.

As can be seen from the foregoing, of the many statements cited by the plaintiff in this ill-focused libel suit, there was not one that was actionable. Without exception, the statements at issue were either opinion absolutely privileged under the First Amend-

ment, or statements which the plaintiff utterly failed to show susceptible of being proved false. Indeed, most of the factual statements claimed by the plaintiff to be defamatory were, on the record before us, demonstrably true! Given these rather striking and fundamental deficiencies in plaintiff's case, it is unnecessary for us to reach the issue of malice with which plaintiff seems to have been preoccupied. Large portions of the record are taken up with testimony and documents through which the plaintiff attempts to show that Moor-Jankowski bore ill-will towards Immuno and that Moor-Jankowski considered Immuno a competitor whose research efforts he wished to undermine. Plaintiff urges that the alliance between Moor-Jankowski and Shirley McGreal, people who had previously had strong differences and apparently had not always held each other in high regard, had no other purpose but to smear Immuno's reputation. None of this evidence, however, has any relevance to the dispositive issues in this case. Regardless of what the defendant's motives may have been, what was said was not actionable and the law of libel was not properly used by the plaintiff as an instrument for its suppression.

Accordingly, the order of the Supreme Court, New York County, (Beatrice Shainswit, J.), entered August 17, 1987, which, *inter alia*, denied the motion of defendant Moor-Jankowski for summary judgment, should be reversed, on the law, to the extent appealed, the motion granted, and the complaint dismissed, with costs.

The motion by prospective *amici curiae* World Wildlife Fund, Sierra Club, et al., and the New York Civil Liberties Union for leave to appear and file briefs should be granted.

SULLIVAN, ROSS, ROSENBERGER and SMITH, JJ., concur.

Order, Supreme Court, New York County, entered on August 17, 1987, unanimously reversed, on the law, to the extent appealed, the motion granted, and the complaint dismissed. Appellant shall recover of respondent $75 costs and disbursements of this appeal. The motion for leave to appear and file briefs is granted.

Order filed.

ORDER GRANTING MOTION FOR LEAVE TO APPEAL
(reported at 74 N.Y.2d 602, 541 N.Y.S.2d 985,
539 N.E.2d 1113)

State of New York,
Court of Appeals

*At a session of the Court, held at Court of Appeals Hall in the City of Albany on the ninth day of May A.D. 1989*

Present, HON. SOL WACHTLER, *Chief Judge, presiding.*

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1-13 Mo. No. 263
Immuno, A.G.,

Appellant,

v.
J. Moor-Jankowski,

Respondent.

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A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been duly submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted.

s/Donald M. Sheraw
Donald M. Sheraw
Clerk of the Court

ORDER DENYING MOTION FOR REARGUMENT

State of New York,
Court of Appeals

*At a session of the Court, held at Court of Appeals Hall in the City of Albany on the fifteenth day of February A.D. 1990*

Present, HON. SOL WACHTLER, *Chief Judge, presiding.*

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Mo. No. 86

Immuno, A.G.,

Appellant,

v.

J. Moor-Jankowski,

Respondent.

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A motion for reargument in the above cause having been heretofore made upon the part of the appellant herein and papers having been duly submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

s/Donald M. Sheraw
Donald M. Sheraw
Clerk of the Court

DECISION OF THE SUPREME COURT OF THE UNITED STATES, JUNE 28, 1990

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# Supreme Court of the United States

No. 89-1760

Immuno, A.G.,

Petitioner,

v.

Jan Moor-Jankowski

ON WRIT OF CERTIORARI to the Court of Appeals of New York,

THIS CAUSE having been submitted on the petition for writ of certiorari and response thereto,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court in this cause is vacated with costs, and that this cause is remanded to the Court of Appeals of New York for further consideration in light of *Milkovich v. Lorain Journal Co.*, 497 U.S. ___ (1990).

IT IS FURTHER ORDERED that the petitioner, Immuno, A.G., recover from Jan Moor-Jankowski Three Hundred Dollars ($300.00) for its costs herein expended.

June 28, 1990

Clerk's costs: $300.00

MANDATE OF THE SUPREME COURT OF THE UNITED STATES, AUGUST 2, 1990

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# United States of America, ss.:

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To the Honorable the Judges of the Court of Appeals of New York,

GREETINGS:

WHEREAS, lately in the Court of Appeals of New York there came before you a cause between Immuno, A.G., Appellant, and J. Moor-Jankowski, Respondent, No. 1 No. 253, wherein the judgment of the said Court of Appeals was duly entered on the fourteenth day of December, 1989, as appears by an inspection of the petition for a writ of certiorari.

AND WHEREAS, in the 1989 Term, the said cause having been submitted to the SUPREME COURT OF THE UNITED STATES on the said petition for writ of certiorari, and the Court having granted the said petition.

ON CONSIDERATION WHEREOF, it was ordered and adjudged on June 28, 1990, by this Court that the Judgment of the above court in this cause was vacated with costs, and that this cause is remanded to the Court of Appeals of New York for further consideration in light of *Milkovich v. Lorain Journal Co.*, 497 U.S. ___ (1990).

IT IS FURTHER ORDERED that the petitioner, Immuno, A.G., recover from Jan Moor-Jankowski Three Hundred Dollars ($300.00) for its costs herein expended.

NOW, THEREFORE, THE CAUSE IS REMANDED to

you in order that such proceedings may be had in the said cause, in conformity with the Judgment of this Court above stated, as accord with right and Justice, and the Constitution and Laws of the United States.

Witness the Honorable WILLIAM H. REHNQUIST, Chief Justice of the United States, the --------- 2nd ---------- day of -------- August ---------- in the year of our Lord one thousand nine hundred and ninety.

Cost of Immuno, A.G.:
Clerk's costs: $300.00

/s/
Clerk of the Supreme Court of the United States

No. 89-1760

Immuno, A.G.
v.
Jan Moor-Jankowski

New York Court of Appeals

---x

IMMUNO A.G.,

Plaintiff-Appellant,

- against -

DR. JAN MOOR-JANKOWKSI,

Defendant-Appellee.

---x

# TRANSCRIPT OF ORAL ARGUMENT ON REMAND

November 15, 1990

APPEARANCES: RAYMOND FERSKO, Esq.

PHILIP BYLER, Esq.

JUDGE WACHTLER: Welcome back.

MR. FERSKO: It's nice to be back.

JUDGE WACHTLER: You may proceed, Mr. Fersko.

MR. FERSKO: Yes, your Honor. May it please the court, Judge Wachtler, may I have two minutes of my time for rebuttal?

JUDGE WACHTLER: Certainly.

MR. FERSKO: The question posed on the court's day calendar regarding this case was, are comments published in a letter to the editor protected free speech?

Respectfully, this case is not about an unsolicited garden variety letter to the editor. Moor-Jankowski's liability is not vicarious liability.

He was sued for his abuse of the right of free expression. Moor-Jankowski's liability here is for soliciting, endorsing, and more importantly, specifically supplying the libelous material in the letter to the editor and the editorial note.

JUDGE WACHTLER: Mr. Fersko, was the crux of the libel, as you call it, the alleged misstatement with respect to there not being a test for hepatitis and the fact that the chimpanzees would be allowed to go back into—

MR. FERSKO: No, your Honor.

JUDGE WACHTLER: What was it?

MR. FERSKO: The crux of the libel was that Immuno, a company whose entire business is to protect people from getting disease, would have been so stupid and so wanton and so reckless that they would have made a proposal which on its face could result in the spread of hepatitis.

Dr. Moor-Jankowski, not McGreal, Moor-Jankowski, wrote at the top, published an editorial note and requested that twice the headline appear on that editorial note saying, A Project With The Potential to Spread Non-A, Non-B Hepatitis in West Africa.

Dr. McGreal didn't know anything about hepatitis. She testified that she didn't. Dr. Moor-Jankowski told her to add, told her to send the letter to him and said, in paragraph numbered one on page two of the letter to the editor, that she should add: there is no way to determine that an animal is definitely not a carrier of the disease.

And then—

JUDGE WACHTLER: (Interposing.) That's the point there. Making that point. You say that's a misstatement of fact, do you not?

MR. FERSKO: That is not a misstatement of fact. There is no way to determine if an animal is a carrier. But the implication from a medical doctor, who is not a medical doctor, Dr. Moor-Jankowski bestowed his medical degree, together with the headline that Immuno made this project, leads any reader to believe that this was a project that could result in the spread of hepatitis.

JUDGE KAYE: And that is what you refer to as the core libel?

MR. FERSKO: Absolutely, your Honor. It's not something that could happen, something that might happen. It's something that they said Immuno itself did. And it's not something that McGreal said. It's something that Moor-Jankowski said and something that Moor-Jankowski knew.

And there is no better proof in the record that Moor-Jankowski understood the implication of what he was doing when he set this up than if you look at pages 33 and pages 34 of Dr. Moor-Jankowski's answering brief on the remand—

JUDGE HANCOCK: Haven't we decided this very question in a prior appeal by saying under our existing laws, Steinhilber and the other cases, that a reasonable person reading this would interpret it as a statement of opinion.

Now we've had the Milkovich case, and why is it any different? As I read Milkovich it says the dispositive question then becomes whether or not a reasonable fact finder could conclude that the statements apply an assertion which is sufficiently factual to be susceptible of being proved true or false.

Why is anything changed, if it has?

MR. FERSKO: I think what, we've got extraordinary and compelling circumstances in that we have had the Milkovich decision. And the cases that you cite, your Honor, all of the

opinion cases that have emanated from this court, Rinaldi, Steinhilber, Silsdorf and Immuno, had their predicate in the language in Gertz, and the Milkovich court said that that language, that that was a misapprehension that all the courts around the country had.

JUDGE HANCOCK: (Interposing)—but really, wasn't Milkovich just saying, look, don't apply this Gertz dictum with a heavy hand. Just don't apply it willy-nilly, but analyze each case. As I think some of our cases indicate, we have, and address the question, whether or not the statement is sufficiently factual to be susceptible of being proved true or false.

Was Milkovich saying, in the Milkovich decision—

MR. FERSKO: (Interposing.) Milkovich said—

THE COURT: (Interposing)—saying anything more than—

MR. FERSKO: Yes.

THE COURT: —don't take the Gertz opinion as gospel?

MR. FERSKO: It said don't create arbitrary distinctions. It said don't create a separate privilege for opinion because we have such. The Supreme Court has not provided just a floor of rights. The Supreme Court in the area of defamation law has provided, since New York Times and its progeny, culminating in the Hepps burden of proof on the plaintiff, that the plaintiff must prove falsity, and then the Milkovich case says that we've got an overriding commitment to free expression in this country and that it is not necessary to create arbitrary distinctions as to fact and opinion, when we have this overriding commitment and we have these strong protections for the media and the press in this country.

That's what Milkovich was saying, and Milkovich said that if you—also, this rule as this court said, has proved elusive. It's not been an easy rule to apply.

Milkovich gives us a predictable rule, a rule that could

result in a coherent body of law, hopefully. And what Milkovich—and with all due respect to the Appellate Division, the Appellate Division just got it wrong.

They examined McGreal's conduct, not Moor-Jankowski's conduct. The Appellate Division confused fault with falsity. They said Shirley McGreal could hardly be faulted for assuming that Immuno would not conduct an inoculation test.

But it's not Shirley McGreal who's the defendant here—

JUDGE KAYE: But it's her letter.

MR. FERSKO: With all due respect, your Honor, the same question came up last time I was here.

It's not her letter that—the implication that is derived from this letter is something that Shirley McGreal didn't know anything at all about when Moor-Jankowski said to her, write a letter.

She came to Moor-Jankowski and she said, look, remember the Immuno company that we had the litigation with two years ago when we tried to stop the from taking your chimpanzees out of LEMSIP?

Now I understand they're going to try to set something up in Sierra Leone. And Moor-Jankowski said, after he saw some underlying documents that she had, said, we'll say that what they're doing is going to spread hepatitis. And she said, how could that be?

JUDGE KAYE: Mr. Fersko, I understand your point, and you are rearguing a point you made here previously, and I believe also on a reargument motion about the deliberate incitement and we held against you on that point and said there were no more than conclusory assertions.

And what I understand we are now to consider is the central question, the core libel question, in light of Milkovich.

So this argument about this being Dr. Moor-Jankowski's

deliberate incitement, might I suggest, is a bit beyond the scope of the remand, or at least one of the questions that we should be looking—

MR. FERSKO: I'd like to answer on two levels, if I may. I think that it should not be beyond the scope of the remand, and with all due respect, under 5501(b), this court should review the facts that the Appellate Division made and those findings were clearly wrong.

The Appellate Division—

JUDGE KAYE: (Interposing.) Yes, but you argued that once and you had a motion for reargument as well on that point.

MR. FERSKO: I think that the court, though, at that time was spending a lot of time looking at context, and I think that the court just didn't focus on these facts. And now, particularly in Milkovich, Milkovich says, look at the implication of the four corners of the document.

There can be no question but that the implication of the four corners of this document is that Immuno made this proposal, and that this was a proposal that could result in the spread of hepatitis.

Now if you're a company that's in the business of producing hepatitis vaccines one day, and AIDS vaccines one day, and products that keep people alive, you don't want the regulatory authorities that you're dealing with to think that you would go out and make a proposal that could result in the spread of hepatitis.

And the way Moor-Jankowski set it up, not only, I mean you'll see in the record he said, I want this headline on the page twice.

He also gave, he gave an editorial note which doesn't tell the truth. He could have avoided this whole problem. I mean, Dr. Eibl wrote to Moor-Jankowski and he said, you consider the scientific aspects of this. Read the editorial note. Nowhere does he say that Dr. Eibl wrote to him and told him to consider the

scientific aspects.

And Moor-Jankowski knew, he released chimpanzees in '81, in '82, in '84, in '85. But he says, in the magic year, 1983, I didn't know. He says, I didn't know, you can't say that I knew that that fact was false. That's a question for the jury. That's not a question that this court should decide.

JUDGE HANCOCK: Is there anything in Milkovich which would suggest that in applying the test of whether or not the statement is sufficiently factual to be susceptible of being proven true or false, a court should ignore the context and the circumstances relating to the statement?

MR. FERSKO: I think there is. I think that--I would like to discuss the issue of the letter to the editor and the letter to the editor concept.

But I want to come back and say that Milkovich says — that's proven to be an arbitrary distinction. It's proven to be difficult. Even Justice Brennan in his dissent agrees with that.

And they say, simply determine if there are statements that are provable of being determined true or false, then it's actionable.

JUDGE WACHTLER: And that's the statement here. You see, I come back to my original—

MR. FERSKO: The implication of the statement, your Honor.

JUDGE WACHTLER: What is the implication?

MR. FERSKO: That Immuno made a proposal, a proposal that could result in the spread of hepatitis. Immuno never made such a proposal.

If you take the exact words of the Bieber proposal, as referred to in the second page of the letter to the editor, it says here that Immuno would release animals in perfect condition.

Now we know that Immuno agreed six months later not to release them. That fact seems to have been ignored the last time I was here.

But even if you take it just as it was, just as stated, they said they were going to release them in perfect condition.

Moor-Jankowski knew that you can determine if a chimpanzee is capable of being determined as infectious. Therefore, why would he then tell McGreal, put this in here, that you can't tell the carrier state.

Then I'll write the editorial note and we'll put a headline here, a project with the potential to spread non-A, non-B hepatitis. And while we're at it, we'll give you a medical degree.

So now everybody looks at this and they think that a medical doctor writing in a medical journal is saying that this company made a proposal, which on its face could result in the spread of hepatitis, when on its face Moor-Jankowski knew it could not result in the spread of hepatitis.

Otherwise, Moor-Jankowski specifically during the—he goes on and on in his brief to try and distinguish those facts, to distance himself from that knowledge.

If that was something—if that wasn't a statement capable of being proved true or false, the implication of that statement, and Milkovich says, look at the implications, then Moor-Jankowski wouldn't have had to put those ten pages in his brief trying to distance himself from the knowledge.

He's saying, you don't got me because there's no evidence that shows that I knew in 1983. Now I don't believe any jury will believe that when he shipped them in '81 and he shipped them in '82 and he shipped them in '84 and he shipped them in '85, that any jury will believe that he didn't knew that you could tell whether a chimp was infectious in '83.

And more so, we lawyers talk about hornbook law. This was basic science. It goes back to Koch's postulates from the year 1850 and it's set forth in footnote 19 of our brief on the remand,

the reply brief.

I mean he didn't have to learn this from something that he read conveniently that he points to in 1985. This was basic science and Moor-Jankowski knew it.

JUDGE WACHTLER: Did everyone else who read this publication know it?

MR. FERSKO: I don't know what everyone else—

JUDGE WACHTLER: If it was that basic, I mean—

MR. FERSKO: Well, not everybody—

JUDGE WACHTLER: This was a scientific publication, was it not?

MR. FERSKO: It's a scientific publication that primatologists read. Not everybody that reads this is a medical doctor.

JUDGE WACHTLER: You say there are a lot of people who would read this who wouldn't know this basic hornbook proposition?

MR. FERSKO: That's right. And certainly, you know, it's a little bit like I know that under the '33 Act that you could sell stock to 35 people, and if I have somebody write a letter in similar circumstances where I want to go after somebody and I say, say that there's no way you could have offered that stock to ten people, a lot of lawyers will read it. They'll think that that company did something wrong.

JUDGE KAYE: Are those tests that Immuno had in place?

MR. FERSKO: Those are tests that Immuno said they would do, of course.

JUDGE KAYE: Is that a matter of record, that they have those in place?

MR. FERSKO: Yes. At the depositions when asked what they would do, that's what Dr. Eder said.

JUDGE KAYE: Do you happen to have the record or could you leave the citation with the clerk?

MR. FERSKO: We will. I think we'll be able to get it before my rebuttal.

JUDGE WACHTLER: You have your two minutes for rebuttal, Mr. Fersko.

MR. FERSKO: Okay. I'll let Mr. Byler take over. Thank you.

JUDGE WACHTLER: Mr. Byler.

MR. BYLER: Good morning, your Honors. My name is Philip Byler. It is my privilege to represent Dr. Moor-Jankowski in this case.

This court has already considered this case, and on the basis of Judge Kaye's magnificent opinion, already affirmed the Appellate Division's grant of summary judgment. The issue—

JUDGE WACHTLER: You've gotten one vote now.

MR. BYLER: The issue on this remand is whether the U.S. Supreme Court's decision in Milkovich dictates a different result.

It does not for the three reasons, basic reasons, stated in Dr. Moor-Jankowski's brief. Immuno's argument to the contrary rests upon mischaracterizations of the letter, the editorial note and distortions of the record.

Let me turn to the first argument which is that under Milkovich summary judgment is appropriate because there's no triable issue of falsity, much less culpable falsity.

Remember in this case an opportunity to reply was given, and indeed in the editorial note, Dr. Moor-Jankowski

printed the view of the Immuno attorneys condemning the letter.

But the Appellate Division meticulously reviewed each factual assertion in the McGreal letter and concluded not only had plaintiff failed to come forward with proof of falsity, but that indeed the statements of fact were demonstrably true, exclamation point.

This court in its prior opinion accepted that determination and relied upon it, and there is nothing in this remand which calls for a different conclusion.

JUDGE KAYE: Mr. Byler, the Milkovich opinion, I've noted, has been discussed as somewhat difficult. Would you say that the analysis undertaken by the Appellate Division, the line by line, word by word, analysis is what is dictated by Milkovich?

MR. BYLER: Yes, quite frankly. And that was the approach in our brief, and that's why we relied on the Appellate Division's findings in this case.

Now in Milkovich, there was an article published in a newspaper, the nine complained-of paragraphs on page 22 of Dr. Moor-Jankowski's brief, and the dispositive issue according to Justice Rehnquist was whether these paragraphs could be read by a reasonable fact finder to imply the specific crime of perjury, and Justice Rehnquist answered in the affirmative.

Now in contrast what you have with the McGreal letter are conservationist concerns over the potential future consequences and motive of the Immuno proposal.

As Judge Kaye wrote in her opinion in this case, the writer presumed and predicted as to what appeared to be or might be or could well happen or could be the motivations for and future consequences of plaintiff's proposed chimpanzee program.

And as Judge Kaye further wrote, the Appellate Division's extensive analysis of the record amply demonstrated there were no triable issues of falsity. Under Milkovich, summary judgment is appropriate.

I would cite your Honors' attention to the Unelko v. Rooney case, because in that case the District Court had entered summary judgment on the ground of the opinion privilege and that there were no triable issues of falsity.

When the 9th Circuit heard the case Milkovich had already come down and on the basis there were no triable issues of falsity, the 9th Circuit affirmed summary judgment.

JUDGE KAYE: Mr. Byler, what about what Mr. Fersko describes as the core libel, which is that there's no way to determine that an animal is definitely not a carrier of the disease?

MR. BYLER: Yes, that's exactly what I want to attend to now.

What the Appellate Division wrote was the following and I say this to put the issue in proper context.

That it was true because there is no test for the viral agent, the hepatitis non-A, non-B viral agent, there is no test for it.

And Immuno's argument as to the inoculation procedure to identify infectiousness could not be faulted in terms of its omission because it was totally impractical, wasteful, rarely used, not something which you could credibly consider that Immuno would be doing in connection with the idea of releasing 60 to 80 animals per year to the wild.

JUDGE KAYE: Is it that the test was impractical or that the test didn't exist?

MR. BYLER: The test doesn't exist to support the statement, there is no way to determine that an animal is definitely a carrier of the disease.

You need to identify the hepatitis, non-A, non-B viral agent in order for you to definitely determine, underscore the word "definitely," that an animal is not a carrier.

Now the problem is Immuno has confused the thrust of

Dr. Moor-Jankowski's argument and has also confused two separate propositions.

One proposition is that you can determine whether an animal is infectious. The second proposition is you can determine an animal is not infectious.

Now two deposition excerpts are cited from Dr. Moor-Jankowski's testimony.

The first one, Dr. Moor-Jankowski testified that he could presume an animal to be infectious on the basis of being exposed. The affirmative is what's affirmed.

He also says he could not determine that an animal is not infectious. That testimony is fully consistent with the McGreal letter.

In a second deposition excerpt, Dr. Moor-Jankowski identifies the inoculation procedure. That is also fully consistent with the McGreal letter because the inoculation procedure identifies infectiousness, not the viral agent, and given the practical limitations on the inoculation procedure, you cannot conclusively determine that an animal was not infectious.

To quote the words of the eminent scientist, Dr. Prince, who discovered hepatitis, non-A, non-B, who's the preeminent authority recognized by the Appellate Division: I think that everyone who's involved in research in non-A, non-B chimps could agree that you cannot exclude whether the animal is infected.

Also please note, that in Immuno's brief on page 28 they quote a passage of Dr. Prince's 1984 letter to the editor. They tried to discredit Dr. Moor-Jankowski's testimony, but what it really does is support Dr. Moor-Jankowski's position.

Dr. Prince writes: Sub-inoculation of serum from such animals has not so far revealed them, the chimps, to be infectious. However, more such tests need to be done.

Why? Because you're trying to prove a negative. The

infectiousness tests or procedure, the inoculation procedure, is not determinative. It's fully consistent with the McGreal letter to the editor.

One further note on this. Immuno has cited to page 27, note 19 of its reply brief, and I was going to address that, and putting aside the fact that some of the remarks in the footnote—the Koch postulates, by the way, deal with bacteriology. Hepatitis non-A, non-B is a virus, not a bacteria.

But if you apply the Koch postulates you support the McGreal letter. Why? Because the Koch postulates require isolating the agent, the viral agent, growing it in a pure culture and inoculating a test subject with that agent.

It is undisputed that there is no test, no way to isolate the hepatitis non-A, non-B viral agent. I submit to you the footnote containing nonrecord evidence is what demonstrates the truth of the McGreal letter.

The Koch postulates show that the inoculation procedure for identifying infectiousness do not satisfy those postulates.

Now there are some other arguments of Immuno in their reply brief. The truth of the matter is the Appellate Division dealt with all of them. It's rather disturbing to see arguments cast in terms of Moor-Jankowski lying when the Appellate Division's analysis shows that Dr. Moor-Jankowski published a letter expressing viewpoints based on demonstrably true factual assertions and there's just no place in this court for that kind of reply brief accusation.

Now I'd like to turn to the second ground for affirming summary judgment, and that is under the independent state ground of Article I, Section 8, this court can reaffirm its prior opinion and I urge you to do so.

As Chief Judge Wachtler wrote in Beach v. Shanley, this state has provided one of the most hospitable climates for the free exchange of ideas.

JUDGE WACHTLER: That's two votes.

MR. BYLER: I submit to you that to adequately protect that free exchange, this court should adhere to its prior opinion as a matter of state constitutional law.

What this court did—

JUDGE BELLACOSA: Even if we agree with you by some chance with the two votes that you've collected under the Milkovich—

MR. BYLER: (Interposing.) Yes, I'm saying I'd win under Milkovich, I can win under Milkovich, given the Appellate Division's—

JUDGE BELLACOSA: But you want belts and suspenders?

MR. BYLER: Let's put it this way, it was an opinion worth preserving, and I mean that sincerely, because what this court did was to approach the subject with the practical test, with constitutional values looming large in mind, and articulated a method of analysis that protects free expression as well as adequately accommodates reputational interest in a far superior manner to Milkovich. You got it right the first time.

The application of what has been considered the settled rule, and it's discussed at pages 53 to 55 of Dr. Moor-Jankowski's brief, entail looking at a number of different criteria.

First of all, the letter to the editor context. Letters to the editor provide a forum for individuals to express their viewpoint. It's not an occasion where you expect a vigorous and comprehensive treatment of the facts.

It's a way for people to say what's on their mind.

JUDGE KAYE: And what place, Mr. Byler, what place does context have under Milkovich?

MR. BYLER: It's a good question because Justice Rehnquist does refer to the general tenor of the newspaper article. One could read in that that he considered context. He did not

elaborate.

One would hope that in future elaborations one would see consideration of context because quite frankly, and I have to quote Justice Holmes on this, the nature of language is such that you should consider context.

JUDGE HANCOCK: Is there anything in Milkovich which excludes context?

MR. BYLER: No. The focus, however, in Milkovich is a linguistic analysis and that's the problem, the focus of Milkovich. I'm not saying that context is impermissible in Milkovich. I'm just saying it didn't seem to be the focus of the analysis. It's a problem.

JUDGE HANCOCK: Well that would be because of the nature of the case, whether or not it committed perjury.

MR. BYLER: Yes, yes—

JUDGE HANCOCK: —a narrow question.

MR. BYLER: Absolutely, I do agree with that. But context is appropriate. But Justice Holmes said a word is not a crystal, transparent, unchanged. It is the skin of a living thought and may vary greatly in the color and content, according to the circumstances and time at which it is used.

Of course, a letter to the editor context is an occasion when the average reader of a publication would consider that viewpoints are being expressed, and it is a public forum.

The court went on and looked at the specialized audience of the Journal of Medical Primatology. That audience consisted of doctors and researchers, medical research libraries.

This publication is read by a sophisticated audience, very capable of understanding the nature of Dr. McGreal's assertions. That they were an expression of an opinion.

The opinion goes on and looks at the editorial note. The

editorial note describes who Dr. McGreal is, shows what her viewpoint is, and also discloses the Immuno's attorney's letter condemning the McGreal letter. You know from the editorial note that Immuno doesn't like it.

A public controversy involved. Quite frankly, there's a very heated public controversy, when you're talking about the use in medical research of an endangered species, chimpanzees, which are protected under an international treaty, CITES.

And one of the disturbing parts of this litigation, quite frankly, is here we have an international treaty involved, here we have the kind of discussion which we would like to see about such implications of a treaty and we have a libel lawsuit costing literally millions of dollars.

JUDGE WACHTLER: Thank you very much, Mr. Byler.

MR. BYLER: Oh, okay, I'm sorry. All I would have to say is that the brief for Dr. Moor-Jankowski, I think, amply demonstrates why it is this court should reenter its order affirming summary judgement and quite frankly in a case where there is a notorious chilling effect consistent with valued constitutional freedoms, there is, I submit, one result and that is to reenter the order affirming summary judgment.

JUDGE WACHTLER: Thank you, Mr. Byler.

Mr. Fersko.

MR. FERSKO: At A-1110 is the testimony from Dr. Eder with respect to the test.

A couple of quick points I'd like to try to make in rebuttal, if I may.

Number one, Justice Kaye, I would like you to focus on what the core libel is. The core libel is not the test. The core libel is that—it is not the test in terms of carrier state.

The core libel is the implication from the editorial note,

the implication that says there was a project with a potential and that Immuno was the one that was going to make that project, that had proposed that project—

JUDGE KAYE: Well when I used those words, Mr. Fersko, I was just quoting from your brief as to what the core libel was.

MR. FERSKO: That was the brief. We were here last time, I would say in light of Milkovich now, we're looking at the entire implications of what this libel letter has said, and I think it's focused us a little more also this time around.

And really, and that's one of the reasons that I'm trying to use the libel letter the way I am and if you take the implications of what's said here, the implication is that Immuno made a proposal and that the proposal would result in something dangerous, and that's just not the case.

We talk about the editorial note. The editorial note is a pack of lies. The editorial note, he doesn't say that Dr. Moor-Jankowski received from Dr. Eibl a letter to say, consult yourself on the scientific aspects. That's the reason we brought this suit, because we were concerned about these scientific aspects and that there was a false statement made that we would make that proposal.

The editorial note tells you that the editors advised the lawyers to go to Shirley McGreal to get the documents. Never.

The editorial note says that the lawyers wrote a letter to Dr. Moor-Jankowski and requested the documents. They wrote twice. It only says once, because Moor-Jankowski wrote back and said we don't give documents in this country that come from protected sources. It sounds astounding in a medical journal.

JUDGE WACHTLER: Thank you very much, Mr. Fersko.

MR. FERSKO: Thank you.

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This is to certify that I am a Dictating Machine Transcriber employed by Nationwide Reporting Coverage; that I have typed the above record from a videocassette recorded in the State of New York and that to my best knowledge and belief the above record as typed by me is a true and correct record of the contents of the videocassette.

s/Rudy Schechter

Date videocassette was transcribed: December 21, 1990

New York Court of Appeals

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IMMUNO A.G.,

Plaintiff-Appellant,

- against -

DR. JAN MOOR-JANKOWKSI,

Defendant-Appellee.

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# TRANSCRIPT OF ORAL ARGUMENT

THE BAILIFF: (Claps 3 times) The Judges of the Court.

Hear ye, hear ye, hear ye. All persons having any business before this Court of Appeals, held in for the State of New York, may now draw near, give their attendance and they will be heard.

JUDGE WACHTLER: Immuno versus Moor-Jankowski?

THE BAILIFF: Ready in the Courtroom.

JUDGE WACHTLER: Mr. Fersko?

BY MR. FERSKO:

MR. FERSKO: Good afternoon. May it please the Court, my name is Raymond Fersko. I am counsel for Immuno AG, plaintiff-appellant in this proceeding. Judge Wachtler, I

would like to reserve three minutes of my twenty for rebuttal, if I may?

JUDGE WACHTLER: Certainly, if you find it necessary.

MR. FERSKO: Thank you, your Honor.

The question before this Court is whether the statements are false assertions of fact or protected opinion.

The record shows that the statements are either assertions of fact known to be false, or mixed opinion, which is actionable under this court's decision in Silsdorf against Levine.

Shirley McGreal testified that Dr. Moor-Jankowski supplied all of the information for the libel letter respecting hepatitis.

Dr. Moor-Jankowski testified, when he was confronted with documents during the course of his deposition that showed he had released Non-A, Non-B exposed chimpanzees to breeders or animals dealers, that he could tell if they were infectious.

JUDGE KAYE: Mr. Fersko, what weight would you give to the context of these statements? And by that, I mean particularly, what weight would you give to the fact that these statements are contained in a letter to the editor.

MR. FERSKO: The law is replete with many cases where letters to the editors had been held to be actionable. Obviously, the context of a letter to the editor, in an Op-Ed piece in the New York Times or in the general media would be considered more opinion than in a refereed scientific journal, such as we have here.

Dr. Moor-Jankowski testified, at his deposition, that everything in this Journal of Medical Primatology was refereed material, including the libel letter. Plus, he really vouched for the libel letter and the factual contents set forth in the libel letter with an editorial note bringing up to date the period from January of 1983 through the date of the editorial note of October 1983, and

the time in which it was published in December of 1983, that the reader was given a full set of circumstance with respect to the content—it is factual content—set forth in this medical journal.

Indeed, he also gave Shirley McGreal a medical degree when, in fact, she had an Ed.D. from the School of Home Economics at the University of Cincinnati.

JUDGE KAYE: But this letter was quite plainly her expression of her view in a letter to the editor; was it not?

MR. FERSKO: With all due respect, your Honor, it was not her view; she testified that everything contained in the letter, with respect to hepatitis was given to her by Dr. Moor-Jankowski.

The core libel at bar was the statement that said you can not tell whether or not a chimpanzee exposed to Non-A, Non-B hepatitis is capable of carrying that disease to another chimpanzee. And from that core libel, all of the other libels set forth in the letter to the editor are derived.

The next most important libel set forth was the fact that the letter to the editor said—

JUDGE HANCOCK: What is the libel in that last quoted statement? Is it dependent on an inference that humans could contract hepatitis? Is that the alleged libelous inference?

MR. FERSKO: Judge Hancock, my client is in the business of producing safe and efficacious plasma derived products and vaccines that are made from human matter. If those products aren't safe, people take them and they die. And for readers in a medical journal to think that they would engage in a scientifically—in a proposal, such as this, which would be so reckless and wanton that they would spread hepatitis throughout West Africa, because it holds them up, certainly, that, in and of itself, is a defamatory meaning and is libel per se. Even the Appellate Division determined that.

JUDGE HANCOCK: If that is the alleged libel, then I ask you, where does the paragraph say that?

MR. FERSKO: If you look in the contents of the libel letter—

JUDGE HANCOCK: Because it's—

MR. FERSKO: First of all, the headline says that this was a proposal, a project with the potential to spread Non-A, Non-B hepatitis in West Africa, and it goes on to state that you can not tell whether or not a chimpanzee exposed, in that paragraph numbered 1 on page 281 of the libel letter specifically says that "there is no way to determine that an animal is definitely not a carrier of the disease."

That is a false statement. It was known by Dr. Moor-Jankowski to be false. Indeed, when his deposition was taken, when he was confronted with the evidence that he had released chimpanzees for four years prior to the time of the libel letter's publication, he admitted, under oath, that he can tell whether or not a chimpanzee is infectious with N-A, N-B hepatitis by the standard test, which everyone else who testified in this case also said that they follow.

And that test, quite simply, is inoculating the serum from chimpanzees that have been clear after a certain designated period of time, into another chimpanzee, waiting to see if that chimpanzee is clear and then, to determine whether or not that chimpanzee is susceptible, inoculating that chimpanzee with the N-A, N-B virus.

JUDGE WACHTLER: Mr. Fersko, were you ever sent this letter for comments?

MR. FERSKO: We were—we were not sent the exact letter that was published, but we were sent a letter quite similar to it, from Dr. Moor-Jankowski.

JUDGE WACHTLER: And what did you do about that?

MR. FERSKO: We wrote back to him and we said, put your hat on as a scientist,

Dr. Moor-Jankowski. Put your hat on as the Head of LEMSIP, and as to the other matters, we will consult our lawyers. Because as the Head of LEMSIP—

JUDGE WACHTLER: Did you ever tell him that the matters set forth in the letter were libelous, defamatory or any way inaccurate or incorrect?

MR. FERSKO: Indeed, the lawyers did tell him that, but we specifically said—we never dreamt that Dr. Moor-Jankowski would publish in a scientific journal a letter to—a statement saying that you cannot ascertain the infectiousness of a chimpanzee exposed to N-A, N-B hepatitis. And we said to him—he wrote a letter in the third person, he said, the editor thinks this is important, so Dr. Eibl of Immuno wrote back and said, well the editor should consult the Head of LEMSIP. The same person, Dr. Moor-Jankowski.

Everyone that has testified in this case with respect to N-A, N-B hepatitis, Dr. Prince, Dr. Eder of Immuno, who was the first one to testify with respect to it, all of the documents that were set forth, that are part of the record, all maintain that you can tell whether or not a chimp is infectious with N-A, N-B hepatitis.

JUDGE WACHTLER: If I could just take you back a moment—

MR. FERSKO: Certainly, your Honor.

JUDGE WACHTLER: What you're saying is that you apprised them of the fact that this was libelous, when you were sent this letter in advance of publication?

MR. FERSKO: When we were sent the letter, Dr. Eibl wrote back and said, consult yourself as to the scientific aspects, and as to the other aspects, our lawyers will contact you.

JUDGE WACHTLER: So you went no further than that as far as—

MR FERSKO: We asked him—the lawyers wrote to

him. We were proceeding with caution, we had just finished two years of litigation with Dr. Moor-Jankowski, in order to take our chimpanzees back to LEMSIP, and during that litigation he tried to keep us from doing it, and he put Shirley McGreal and other animal rights people against us, and tried to keep them from exercising their first amendment rights against him, so that he could continue on with his own commercial endeavors.

JUDGE WACHTLER: Now, assuming that this was a product of mere negligence, in other words, that they weren't advised with specificity as to libelous content and that there was, again, negligence, but no more than that. Under Chapadeau, wouldn't they be able to escape ultimate liability?

MR FERSKO: That is correct, your Honor, and I think as a logical corollary to the Chapadeau case, that the readers of the Journal of Medical Primatology, or any refereed scientific journal, don't expect that their editors are going to engage in gross misconduct, and therefore, in a very narrow area, such as this type of a situation, the readers of a scientific journal should expect that their editor, or the authors writing there, will engage as reasonably prudent persons similarly situated.

JUDGE WACHTLER: So that you are saying mere negligence should be the test in instances such as this?

MR. FERSKO: Yes, just as 35 other States apply it as to the general media. I would not say apply it to the general media, I think the Chapadeau standard is the appropriate standard. But I would say, in a situation such as this, with a refereed scientific journal, that there should be a high -- really a higher standard of conduct, because the readers are expecting it, that is what they are paying for when they buy the journal, and that—and that it would be appropriate. And that this Court has an opportunity now to fashion such a standard.

JUDGE BELLACOSA: Mr. Fersko, if the court were to accept your invitation, to have a separate rule for refereed scientific journals, whatever that may mean, how would those publications be identified and categorized for purposes of the application of such a rule?

MR. FERSKO: Journals that hold themselves out as refereed, that subject themselves to peer review—

JUDGE BELLACOSA: And everything that went into them, if they self-proclaimed that they were refereed scientific journals, everything that went into them, including letters to the editor, would, therefore, fall under this more relaxed rule.

MR. FERSKO: Not if the letters to the editor were not self-proclaimed to be refereed, but here, the defendant testified, at page A86 of the record, that every single thing in his journal was refereed, including the letter to the editor. Indeed, he said it was subject to peer review, and that he had shown it to two different scientists to review all of the underlying documents and the underlying facts, and the letter, and that was false testimony. He said that Dr. Goldsmith had looked at it. Dr. Goldsmith was dead. Dr. Rowan, who he said looked at it, testified that he never saw the underlying documents and that he never saw the letter to the editor prior to the time.

JUDGE SIMONS: Really, an argument could be made that you don't need a lesser standard for refereed journals because they are self-policing in a sense. If they're not reliable, they're nothing. It's not like a magazine that's catering to the public curiosity, and so forth. It's a publication that deals exclusively with highly trained people and deals exclusively with scientific subjects.

MR. FERSKO: That's correct, Judge Simons, except that I think the public, that may be here in New York State, where 15% of the world's scientific publications are published; that, maybe, the public ought to be protected in some way from scientific misconduct, such as took place here.

We don't need this—

JUDGE SIMONS: Well, that's my point. The journals, such as this, are catering to a highly sophisticated audience.

MR. FERSKO: Well a highly sophisticated audience looked at this material, and what—you have a nuance in this case that is interesting as compared to most other opinion cases.

Because while it is a threshold determination that you must make, as to whether or not the material is fact or opinion, you have evidence in the record as to how the readers perceived the material.

And the readers here perceived the material as being factual. They thought that a medical doctor was writing, and that a medical doctor said that you cannot determine whether or not a chimp exposed to N-A, N-B hepatitis is infectious.

And Dr. Prince, responding, said that in his competing facility in Liberia, he conducts the same test that Dr. Moor-Jankowski said that he conducts, and he responded to that fact, contained in the letter to the editor, and he also responded to the fact contained in the letter to the editor with respect to release. Just as Dr. Rowan did, following up.

And Dr. Moor-Jankowski, himself, said that he considered the material to be factual. That's found in the first page of the Supplemental Appendix, annexed to the respondent's brief. Similarly, there were—he wrote letters where he said that these were accusations, and in his initial drafts of the editorial note he said that they were allegations, and that Immuno was the incriminated party.

JUDGE KAYE: Mr. Fersko, without reaching any proposed higher standard for refereed scientific journals, I take it it's your position that, even if Chapadeau is the governing standard, that this standard has not been met here for a factual statement.

MR. FERSKO: Absolutely, your Honor.

I'd like, if I may, I see I just have four minutes left.

A couple very important points, the very telling evidence, that was ignored by the Appellate Division, is the fact that the World Health Organization was aware of Immuno's plans in Sierra Leone and their own internal memorandum, of October and November of 1983, specifically stated, that Immuno was not going to release chimpanzees pursuant to an explicit agreement reached with the Government of Sierra Leone.

Dr. Moor-Jankowski testified that he was in constant communication with the World Health Organization, throughout that entire year. He saw documents that were official Sierra Leone documents that said that. He still went ahead and published it. The release was the conduit by which the hepatitis would be spread. And I suggest to you, that the Appellate Division strained to find the evidence against Immuno and ignored that. There is nothing in the record, in their decision at all, even respecting that. And the respondent has not even responded to that in their brief.

Also, I would like to point out that this is a summary judgment case. It has been asserted that this court should relax its standards for summary judgement in connection with—in order to give some added protection to libel defendants. I suggest that there is no basis, in either law or policy, for doing that based upon the decision of this court in Silsdorf, which referred to the actual malice standard as providing enough protection, and based upon the Supreme Court's recent decision, in Liberty Lobby and Calder v. Jones, saying that there are enough protections embodied in the substantive law of libel, that no special added procedural protections are necessary.

If there are not any more questions, I'll let Mr. Sugarman continue.

JUDGE WACHTLER: Very good. Thank you very much, Mr. Fersko.

MR. FERSKO: Thank you.

JUDGE WACHTLER: Mr. Sugarman?

BY MR. SUGARMAN:

MR. SUGARMAN: May it please the court, my name is Robert Sugarman. I represent Dr. Jan Moor-Jankowski.

I think we need to start about ten years ago, with this Courts admonition in Karaduman that, "We must not be reluctant to apply the ordinary rules governing summary judgement in libel cases, such as this, since," and I'm quoting the D.C. Circuit in Washington Post, "the threat of being put to the defense of a

lawsuit may be as chilling as the exercise of first amendment—to the exercise of first amendment freedoms as fear of the outcome of a lawsuit itself."

The wisdom of that warning, your Honors, I think is vividly demonstrated in this case.

It's been pending for five years.

Dr. Moor-Jankowski, the sole remaining defendant, was deposed for fourteen days.

Dr. Shirley McGreal, the author of the letter, was deposed for four days.

There were four depositions taken in Austria, in defense of which Dr. Moor-Jankowski had to retain Austrian counsel.

There were depositions noticed in Sierra Leone, in connection with which Dr. Moor-Jankowski had to retain Sierra Leone counsel.

And all of this flowed from a decision that he made to publish a letter to the editor in a journal. And before publishing that letter to the editor he gave Immuno the opportunity to reply, not once, but twice, an opportunity that was declined ostensibly because they needed the documents on which Dr. McGreal based her views, even though those documents were Immuno's own documents, as pointed out by the Appellate Division.

JUDGE BELLACOSA: Mr. Sugarman, excuse me for interrupting you, but you try to paint a very sympathetic picture, and I can understand why, in your advocacy, you would do that. But it could have been attended to with a very simple disclaimer, could it not? If all those procedures had been put into place preliminarily, why wasn't there a simple disclaimer? That would have reflected the responses and the concerns that your adversary would assert.

MR. SUGARMAN: There was, in the editor's note a mention that Immuno had been given the opportunity to reply. Had declined. And the letter from Immuno's lawyers was quoted,

in which they said, in their view, Dr. McGreal's statements were not fair comment, and I think "fair comment" is an interesting phrase. It only underscores the view that is obvious from the letter, that it was a letter from an animal rights activist known to be such by the readers of this journal, a sophisticated—a small sophisticated group of people experienced in this are—

JUDGE BELLACOSA: Well, my point is that you assert then that that's a sufficient neutralization of the preliminary, or prefatory, material, which appears to give an imprimatur or an endorsement to the letter to the editor.

MR. SUGARMAN: I would read the editorial note as saying that these are the concerns seen by Dr. McGreal, and that's what the editor's note said. They were seen by Dr. McGreal.

It basically refers back to the letter, itself, and gives, completely, the history of the publication, including the attempts to elicit a response from Immuno.

I don't understand how anybody could say now that they never dreamt, as Mr. Fersko says, that Dr. Moor-Jankowski would publish this letter, when twice, not once, but twice, he asked for and solicited a response from Immuno which never, never came.

JUDGE KAYE: Mr. Sugarman, does the fact that this is a letter to the editor from an animal rights activist make her statements, in and of themselves, opinion?

MR. SUGARMAN: In and of themselves, no. But that fact, if you get to the four-part test that this Court adopted in Steinhilber based on Judge Starr's opinion in Ollman, carries it a long way.

The context of the publication, both in terms of the statements in the context of the letter and the broader social context, certainly indicate, to a reader, that these are expressions of opinion from an individual, clearly, who has feelings and opinions in this area, and is supporting a cause.

I don't think there can be any more definite hallmarks of

opinion than the language of this letter—

JUDGE WACHTLER: You say there's a heightened immunity to prosecution for libel if you happen to represent a group such as this, or speak for a group such as this?

MR. SUGARMAN: I wouldn't term it a heightened protection, I would term it as definitely relevant in the context of the four-part test to determine whether—

JUDGE WACHTLER: So that if you represent an extremist group, we'll say, you have a right to say more extreme things about someone.

MR. SUGARMAN: No, I don't think I would term it that way. I think though, that in terms of the question that Judge Kaye asked is to whether it would be viewed as opinion, I think that when reading a letter from someone with a clear bias, written in the way that it was, it certainly indicates, to the reader, that this is an expression of opinion in the context of the letter itself, and in the broader social context.

JUDGE KAYE: Well, Mr. Sugarman—

MR. SUGARMAN: I wouldn't say it's any greater protection, but certainly, it should be no less.

JUDGE KAYE: What about the statement referred to by Mr. Fersko as the core libel. Do you maintain that that's an expression of opinion, when Dr. McGreal says there's no way to determine that an animal is definitely not a carrier of the disease?

MR. SUGARMAN: Well, I think that all you need do, in terms of that, is to look at the opinion of the Appellate Division in terms of how it dealt with what Mr. Fersko now claims is the core libel.

As an aside, I think if you read the briefs, the core libel was the change of plans, but now the change of plans doesn't seem to be the core libel, the core libel is the lack of any tests, and, in the Appellate Division's opinion in commenting on the whole issue of whether or not there is this test, quoted Dr. Prince, a recog-

nized authority in the area, who termed this procedure expensive, laborious and wasteful, and observed that it would involve the infection of healthy chimpanzees. Went on to say, "Under these circumstance, McGreal can hardly be faulted for not assuming that Immuno would necessarily perform the inoculation procedure on every one of the many chimps that intended to return to the wild."

So that it is not at all surprising that Dr. McGreal indeed said this, because there was general agreement that the only way you can determine whether a chimpanzee is a carrier is to go through this laborious, expensive procedure of inoculating hepatitis-free chimpanzees to determine whether they get the disease.

So in that regard, to the extent that there is a statement, it is obviously true, doesn't even have to be true. As the Court below held, the plaintiff in this case has the burden of proving falsity. And there certainly wasn't any evidence in the record as to the falsity of that statement.

I talked, somewhat, about the four-part test, and it seems to me that the key to this case is really in two areas. One: was it opinion, and under this Court's opinion in Steinhilber, I don't think there can be any doubt that this is a pure opinion case.

What this court said in Steinhilber is, a pure opinion is a statement of opinion which is accompanied by a recitation of the facts upon which it is based. That is exactly what we have in this case. The Court then adopted the four part test in Ollman.

I talked, somewhat, about the context. If you go to the first two factors in Ollman, the imprecision of the language, whether it is capable of being true or false, you see statements dealing with motivating factors. Getting around restrictions. Cheapness of wild chimpanzees. Motivation, as this Court held in Rinaldi is clearly something that is not capable of being a proved true or false.

JUDGE HANCOCK: Could that apply, those two factors, apply, do you think, to the statement, "There is no way to determine that an animal is definitely not a carrier of the disease"? That's precise. And what is there about that that said it can't be

proven true or false?

MR. SUGARMAN: Well, I think that there are—that may not be one of those statements, because. . . . But then you get to the second issue that is really before this Court, and that is the appropriateness and propriety of the Court granting summary judgment in a case like this when, as in this case, there are supporting factual statements which support the pure opinion. If that is one of the supporting factual statements, I think the Appellate Division was absolutely right, that the plaintiff, in this case, just did not satisfy the burden of coming forward with sufficient evidence under Anderson and Chapadeau and Hepps to prove that to be false.

I'd like to deal, for a minute, with the whole question, which occupies substantial portions of the appellant briefs, about the so-called change of plans argument; that Immuno had abandoned its original plan, and instead was to take fifty to sixty chimpanzees, in one year, to develop a breeding colony.

In the first place, the evidence taken as a whole shows that there was no such change in plans. In January, Dr. Eibl was quoted in the Austrian press as saying that a breeding facility had insurmountable difficulties that prevent a profitable breeding of these animals. And while, in April, Dr. Eder may have agreed that Immuno should follow the breeding colony procedure, it never did so, and in his deposition Dr. Eibl testified that Immuno continued to be committed to that original plan.

Finally, had such a change of plans actually taken place, Immuno could easily have set the record straight, as it was given the opportunity twice to do.

And even assuming that there was a change in plans, the omission of the reference to change of plans was not defamatory. As the Appellate Division pointed out, "Surely Immuno does not suggest that its very own plan, one which it apparently would have been happy to pursue, was so ill-conceived and so obviously pernicious in its methods and probable consequences that its accurate disclosure caused Immuno reputational injury."

And finally, even if there was a change in plans, and

even if the failure to disclose it was defamatory, there is no evidence that Dr. Moor-Jankowski acted with actual malice, or grossly irresponsibly, in publishing the letter. Indeed the evidence is to the contrary. He believed that the breeding colony proposal couldn't be implemented. He had a Die Presse article in which Dr. Eibl was quoted as saying that the breeding colony proposal faced insurmountable difficulties. He gave Immuno the opportunity to reply, and testified that when they didn't reply, he had, certainly, no cause to believe that they had changed their plans. And Dr. Prince shared his view that this breeding colony proposal was not feasible.

I conclude where I began, with this Court's admonition in Karaduman, that courts should not be reluctant to apply the ordinary rules of summary judgment to libel suits. That's what the Court in Anderson, Supreme Court in Anderson, said. The Appellate Division, in this case, did just that. It applied the ordinary rules of summary judgment to a libel suit.

It held that the plaintiff in this case had the burden of coming forward and proving falsity. It held that it did not do that. It followed the dictates of the Supreme Court of the United States in Bose and carefully, carefully reviewed this record.

If libel suits, such as this one, cannot be put to rest on summary judgment, the fear expressed by the D.C. Circuit and quoted by this Court in Karaduman, will remain a reality.

The exercise of first amendment freedoms will be chilled by the threat of being put to the defense of a lawsuit.

Your Honors, as I submit, that's an intolerable result and ought not to be countenanced.

Thank you.

JUDGE WACHTLER: Thank you very much,

Mr. Sugarman. Mr. Fersko?

BY MR. FERSKO:

MR. FERSKO: Jus a couple of quick comments, if I may.

I submit that the libel is as of the time that the bullet is fired, and not the time the gun is shot.

He had a year to get it right. He saw six months prior to the time that the journal was published, that Immuno had entered into an agreement. That they were not going to release chimpanzees. That was the basis by which they would be spreading Non-A, Non-B hepatitis. Even Mr. Sugarman can't get away from that fact that that was a false fact. And he was out to get Immuno. There was a long history of common law malice probative of his actual malice and probative of his culpability in this case.

With respect to summary judgment, I think that if the issues of fact exist, and if the issues of fact persist after a searching analysis of the record, that the court should not be afraid to apply the ordinary rules of summary judgment. But this is a case where the ordinary rules of summary judgment require that this Court send the case back for a trial.

JUDGE WACHTLER: To you make a determination as to whether it was fact or opinion?

MR. FERSKO: No, I think it was certainly factual. I don't think that you have to do that. I think to send it back for a trial on his culpability.

JUDGE WACHTLER: What is the measure of culpability? What do you want to try here?

MR. FERSKO: His measure of culpability, in order to ascertain punitive damages, would have to be under the actual malice standard.

His measure of culpability for actual damages, and I would like to be able to have that instruction to the jury, should be that of a reasonable scientific editor acting under similar circumstances.

JUDGE BELLACOSA: So, you want us to apply ordinary summary judgment rules and extraordinary libel rules. Because that would be a different rule with respect to the refereed publications that you would want us to adopt.

MR. FERSKO: It would be a logical corollary, in my view, of the Chapadeau decision. Chapadeau says that we look to see if someone is acting in a grossly irresponsible manner as compared to other responsible persons disseminating and gathering news information.

I submit that Dr. Moor-Jankowski is in a different position than the editor of a supermarket tabloid. And when readers read, for instance, about a UFO in a supermarket tabloid, they have different expectations when they read about it in a NASA journal. And this is a different type of a journal.

Thank you.

THE COURT: Thank you very much, Mr. Fersko.

(End of tape.)

# CERTIFICATE

I, ROBERT S. ORDMAN, a Notary Public of the State of New York, do hereby certify that I have caused to be transcribed a videotape containing the oral argument of the appeal in Immuno A.G. v. Moor-Jankowski; that I have compared the foregoing transcript with the soundtrack of said videotape; and that the same is a true and accurate transcript of said proceedings.

I am not related by blood or marriage to any of the parties or their respective counsel.

In witness whereof I have set my hand and seal at New York, New York, this 7th day of May, 1990.

s/Robert S. Ordman
Robert S. Ordman

## Excerpts from Deposition Transcript Of Defendant Jan Moor-Jankowski as to His Knowledge That a Test Did Exist

(p. 543)

Q: In 1979, when the [National Institute of Health] animals were taken, were you able to ascertain which animals that had been exposed to N-A, N-B research were carriers?

A: Yes.

(pp. 593-94)

Q: Are you saying, Doctor, that when you said "healthy chimpanzees," are you saying that you can't determine if a chimpanzee is healthy after it has been exposed to N-A, N-B?

Mr. Bressler: Objection.

A: As I defined it before, if an animal were exposed to Non-A, Non-B, I considered it to be a carrier, unless tests are done of the animals to determine it is not a carrier.

Q: What would those tests be?

A: Inoculating the serum of plasma of this animal into a negative animal and, if the negative animal doesn't become positive, and is then challenged with Non-A, Non-B positive, then I know that the first animal was negative.

**Plaintiff's Exhibit 109**

[Letterhead of]

**NEW YORK UNIVERSITY MEDICAL CENTER**

Laboratory for Experimental Medicine and Surgery
in Primates (LEMSIP)
Long Meadow Rd., Tuxedo, N.Y. 10987

May 9, 1984

Mr. Thomas Hunt
International Animal Exchange
130 East 9 Mile Rd.
Ferndale, Michigan 48220.

Dear Mr. Hunt:

This is to confirm our understanding concerning nine adult chimpanzees (seven males and two females). These animals will be transferred from LEMSIP to your facility at Grand Prairie, Texas, in mid-May 1984, there to be maintained as a social group on one or more islands.

These animals have previously been used on NANB hepatitis studies. Based on periodic surveillance and criteria established by investigators working in this field, they are no longer considered infectious.

In the event that relocation of any one or all of the animals was contemplated, to a zoo, research institute or other type of facility, we should be given first option. New scientific discoveries could again make these animals suitable for studies at LEMSIP at any time.

Furthermore, we would emphasize the importance of sending the history summaries of these animals to any prospective new

owners. Please feel free to inform such interested parties that LEMSIP personnel would be happy to discuss any aspects of these animal's histories.

Sincerely,

J. Moor-Jankowski, M.D.
DIRECTOR, LEMSIP

JMJ:mr
Enc.

EXCERPTS FROM MOOR-JANKOWSKI AND MCGREAL TRANSCRIPTS SHOWING MOOR-JANKOWSKI THE SOURCE OF MCGREAL'S HEPATITIS ALLEGATIONS

(pp. 305-06 of Moor-Jankowski Transcript)

Q: Did you consider Shirley McGreal to be someone who was knowledgeable with respect to hepatitis in primate animals?

A: No.

Q: Is Shirley McGreal a medical doctor?

A: This was discussed before. She is not.

Q: Did you know she was not a medical doctor in 1983?

A: Of course.

Q: Turning to the letter to the editor—

A: I have a copy.

Q: Directing your attention to Paragraph 1 on page 281—

MR. FERSKO: Withdrawn.

Q: Did you supply any of the information respecting hepatitis Non-A, Non-B which is contained in the letter to the editor to Dr. McGreal?

A: Yes.

Q: What information did you provide to her?

A: I became interested, and considered this an important matter in this affair, when I heard that the animals were to be released to the jungle after experimentation with Non-A, Non-B hepatitis.

MR. BRESSLER: I think Mr. Fersko would like an answer to his question.

THE WITNESS: He asked me what I supplied.

Q: I would like to know, looking at the article, which you have in front of you, can you tell me what in the article you supplied Dr. McGreal with respecting hepatitis Non-A and Non-B?

MR. KAUFMAN: We are focusing on Paragraph 1?

MR. FERSKO: I am focusing anyplace in the article that talks abut hepatitis Non-A, Non-B, if he provided her with that information.

A: Paragraph 1 on page 281.

Q: Did you write that paragraph?

A: This is a letter of Dr. McGreal. I did not write her letter. This is the second time you are telling me I was writing her letter.

Q: Did you supply her with the information upon which she wrote this?

A: Yes.

(pp. 395-97)

Q: Doctor, going on to the next sentence, "Furthermore, if contaminated chimpanzees were released from Sierra Leone, disease could spread across that country's borders all across West Africa."

Did you make a statement like that to Shirley McGreal?

A: My statement was, as I said before, that they could become a permanent reservoir.

I don't know about the geographics of the countries, the possibility of the animals migrating.

Q: Did you ever say to her, that if chimpanzees were released

into Sierra Leone, disease could spread across the country's borders, all across West Africa?

A: I said that they would become a permanent reservoir from which the disease could spread.

Q: You did not say to her the statement which I have just read to you; is that correct?

MR. BRESSLER: Objection. Are we talking about the gist or are we talking about the exact words?

MR. FERSKO: We will say it first with respect to the gist.

A: The gist, I said, that hepatitis could then spread from the reservoir.

Q: Let us take the exact words.

MR. BRESSLER: I think that has already been answered.

A: That is the understanding of it.

Q: Going on to the next sentence, did you ever say to her that this would be a situation similar to that of bats who are a permanent reservoir of rabies in many parts of the world?

A: Yes.

MR. BRESSLER: Are you talking of exact words there or gist.

THE WITNESS: No, gist.

Q: Did you use the analogy of bats being a permanent reservoir of rabies?

A: Yes.

(p. 80 of McGreal Transcript)

Q: The one that starts off "Release of chimpanzee veterinarians."

A: Yes. I discussed this with Dr. Moor-Jankowski.

Q: Did he provide you with the information which is contained in paragraph 1?

A: He drew my attention to this possible complication of the project, yes.

Q: Is the language contained in paragraph 1 his language, or is it your language?

A: It is my language.

Q: When did he draw your attention to the possible complication which you referred to as being expressed paragraph 1?

A: I believe I provided him with a set of the documents, and he drew my attention to a potential hazard of rehabilitation that I had not specifically concentrated on.

(pp. 83 to 84 of McGreal Transcript)

Q: I am asking, can you give me your best recollection of the substance of everything that was said, that he said to you and what you said to him, as best you can recall?

A: I truly can't recall word for word.

Q: I don't want you to. I want you to tell me the substance of the discussion as best you recall it.

A: I believe that Dr. Moor-Jankowski said to me, to supplement our arguments based on the conservation of species, that he felt there was a concern over the possibility of a release project that accidentally involved the release of a carrier animal because there was, according to his opinion, no definite way to identify an animal as a carrier of Non-A, Non-B hepatitis.

Q: Did you have any knowledge with respect to the issue of Non-A, Non-B hepatitis prior to your discussion with Dr: Moor-Jankowski, to which you just referred?

MR. FREY: I object to the form. What is the issue of Non-A, Non-B?

MR. FERSKO: Withdrawn.

Q: Did you have any knowledge relating to what is stated in your first sentence of paragraph 1, "Release of chimpanzee veterinarians of hepatitis Non-A, Non-B research would be hazardous to wild populations."

Did you have any knowledge with respect to that statement prior to your discussion with Dr. Moor-Jankowski to which you just referred?

A: No.

EXCERPTS FROM EDER TRANSCRIPT
SHOWING IMMUNO WOULD USE TEST

(p. 161)

Q: Is there any way to tell whether a particular individual is a carrier of Non-A, Non-B hepatitis?

A: Yes.

Q: How?

A: If I take blood, for instance, and inject it by a chimpanzee and the chimpanzee remains healthy, he is absolutely no carrier.

The second method, I make liver biopsies on different occasions and if the liver biopsy shows always in the period of at least one year absolute normal histological pictures, no ultrastructural changes, no other electron microscopic alterations, I can be sure that this person is healthy and will not transmit the disease.

Q: 100 percent sure?

A: Yes.

Q: How can you be 100 percent sure when you have said before that you haven't been able to identify the agent of the virus?

A: Because—

Q: You don't recognize the antigens, you don't recognize the antibodies?

A: I am not speaking about the agent. I just said that I am sure that he will not transmit the disease.

(pp. 757-62)

Q: Was it your view that you could have better laboratory practice and have more certainty that you haven't overlooked any Non-A, Non-B in these animals if you were operating in Austria than if you were operating in Sierra Leone?

(Colloquy Ensues)

A: Now I may answer that question?

Q: Yes, sir.

A: I have a good laboratory practice in Austria, but that lowers the risk of transmitting Non-A, Non-B by the product and that does not influence the risk of an uncertain diagnosis at the end of the whole experiment.

We never had in mind to release for rehabilitation one animal with the slightest idea that this animal may have Non-A, Non-B hepatitis or other forms of hepatitis or other forms of infectious diseases.

# Plaintiff's Exhibit 286

*Memorandum, June 12, 1980*

Dean David Scotch 12th June, 1980.

J. Moor-Jankowski, M.D.

CONFIDENTIAL

In 1978 we had a meeting with Dr. Shirley McGreal, President of the International Primate Protection League, a very radical anti-vivisectionist society. As a result of the discussions, which we considered a consultancy, we have been left undisturbed by the League.

Repeated requests for processing of the consultancy fee, however, were not followed-up by the University (papers repeatedly lost, etc.). I finally have been placed in danger of losing all the goodwill we have acquired over many years with the League and to avoid it have advanced the consultancy fee with my own check.

JMJ:phc

## EXCERPT FROM MOOR-JANKOWSKI TRANSCRIPT SHOWING HIS DESIRE TO GET MCGREAL OFF HIS BACK

Excerpt from page 734 of Moor-Jankowski Transcript.

Q: Referring you to the third paragraph on that page, which states "At this time our laboratory is under considerable pressure from Dr. McGreal and other like minded people who accuse the entire biomedical community as being cosponsor for the breach of the CITES agreement."

Was that a true statement as you made it on November 3, 1983?

A: Yes.

## EXCERPTS FROM DEPOSITION TRANSCRIPTS OF U.S. TAX COURT JUDGE JULIAN I, JACOBS

(pp. 73-75)

Q: Do you have any reason to believe that Dr. Moor-Jankowski and Dr. McGreal were cooperating with each other in order to stop this shipment by Immuno?

A: I have no knowledge. I can only speculate. I have no personal knowledge.

Q: Are you aware of any facts that would give you some reason to believe that they had cooperated?

A: I have inferences that I would make, that would lead me to believe that they might. I could give you—I could go A, B, C, D, and maybe the answer isn't D, but it seems to me maybe it would be, but I have no personal firsthand knowledge, no.

Q: When all this was going on in 1981, did you make those inferences?

A: Oh, yes. You don't want to hear my answer because it's not going to be very helpful to you, counsel.

Q: No, I'd like to hear it.

A: I personally feel that there was something going on between them that both could benefit.

Q: What's your basis for that opinion?

A: Well, just, I guess, logic or common sense, that Dr. Moor-Jankowski had something to lose if these animals were shipped, namely, that there would be less revenues for his place. This is all my opinion.

Q: I understand.

A: I think that he had something to lose. I think that Shirley

McGreal was someone who was—felt very strongly that these animals not be shipped to Vienna, and, therefore, it was in their mutual interest to cooperate together.

I believe that they spoke while this was going on. I have no firsthand knowledge of that.

Q: Why do you believe they spoke?

A: Just when Dr. Moor-Jankowski would speak to me, he would mention her name occasionally. But again, he would use her as an excuse. And said, I'm worried about this, what she could cause me. And I just believed that they knew that was going on together.

Q: Did he ever tell you that he had talked to her?

A: Yes. As a matter of fact he did say that they spoke, and she would cause him problems. As a matter of fact, she, apparently, was the one that instituted the calls to him, now that I think about it. The telephone calls to Dr. Moor-Jankowski—now, he had mentioned that she had called him on several occasions.

**(Pages 102-103)**

Q: Did you have any reason to believe it at the time you signed the affidavit?

A: I don't recall. As I said originally in my deposition, I believed that both the International Primate Protection League and Dr. Moor-Jankowski were working somewhat in concert, but I didn't know whether or not the pressure really came from the Protection League. I think it came much more so from Dr. Moor-Jankowski, but at that time I might have believed it. I just don't recall the incident any more, why I said it.

Q: What is your basis for the statement that you believe the

pressure came much more from Dr. Moor-Jankowski?

A: Oh, because Dr. Moor-Jankowski and I were having dealings with one another, he was the one that was giving me a much rougher time than the—

Q: The question, your Honor, is the pressure placed on the ASPCA, Defendant in this case, to which you are referring in paragraph 8?

A: Well, I have no knowledge that I can recall of Mr. Ulrich telling me that he got any calls from the International Primate Protection—

Q: I'm asking about Dr. Moor-Jankowski, pressure—

MR. FERSKO: He just answered that.

THE WITNESS: But Dr. Moor-Jankowski, I know, did call Mr. Ulrich, because Mr. Ulrich told me about the calls that he received from Dr. Moor-Jankowski; he said that Dr. Moor-Jankowski was the one who told him about the cruelty to animals. He never told me, that I now recall, that the Primate League called.

# Plaintiff's Exhibit 54A

*September 30, 1983 Letter*

[LEMSIP Letterhead]

20th September 1983.

Dr. Shirley McGreal
The International Primate Protection League
P. O. Drawer X
Summerville, SC 29483

Dear Dr. McGreal:

To answer your telephone enquiry about Dr. Franz Sitter from Sierra Leone I can advise you as follows:

We purchased from Dr. Franz Sitter prior to the U.S. signing of the CITES Agreement in 1975 more than 100 chimpanzees.

At that time and later on I was informed by Dr. Sitter that he himself or his employees were catching animals directly in the wild by chasing family groups with hounds so that the babies got tired from running away and were captured, while the adults escaped. Dr. Sitter also told me that he used special traps to catch the chimpanzees but he assured me that he will *not* purchase the animals from native hunters who were killing the mothers in order to obtain the babies.

I hope that the above information will be of use to you.

Yours very sincerely,
/s/
J. Moor-Jankowski, M.D.
Research Professor and Director, LEMSIP

*[In handwriting:]*

We're trying! Shirley

THE EDITORIAL NOTE AND
LETTER TO THE EDITOR
AS THEY APPEARED IN THE
*JOURNAL OF MEDICAL PRIMATOLOGY*

## Editorial Note

## A Project With Potential to Spread Non-A, Non-B Hepatitis in West Africa

In January 1983, the Editors of the Journal of Medical Primatology received a letter from Dr. Shirley McGreal, Chairwoman of the International Primate Protection League, alerting the biomedical community to a new attempt to establish another chimpanzee research laboratory in Africa. This was seen by Dr. McGreal as a violation of the World Health Organization's 1982 statement on the procurement of primates for biomedical research, and as a way to avoid the Convention on International Trade in Endangered Species (CITES).

The Editors submitted Dr. McGreal's letter for "comments or reply" to IMMUNO AG in Vienna, Austria which had been mentioned as the company interested in establishing the laboratory. IMMUNO acknowledged the receipt of the letter on February 17, 1983, but provided no comments, referring the matter to their lawyers in New York. The lawyers requested that the Journal of Medical Primatology provide them with the documents on which Dr. McGreal's accusations were based; they termed the statements to be wholly inaccurate and reckless. They further stated (March 3rd, 1983, letter from Goldschmidt, Fredericks & Oshatz, New York): "We would also like to advise you that our review of Dr. McGreal's letter indicates that it is not a fair comment regarding our client's activities, and should you proceed with publication, without giving us the opportunity for a meaningful response, we shall be compelled to take whatever actions we deem necessary to redress our client's rights."

The Editors advised the law firm that Dr. Shirley McGreal should be contacted directly for access to the original documents, and they extended the period for receiving the rebuttal to April 20, 1983. During that period no additional information was received

from IMMUNO or from their lawyers, but in the meantime, the matter was discussed in the Austrian press, and Dr. McGreal feels that these newspaper articles confirmed the contents of her letter. The final text of Dr. Shirley McGreal's letter of March 23, 1983, reflects the discussion in the Austrian press which occurred after her initial letter of January 30th was submitted for publication and this final letter is printed below.

J. Moor-Jankowski
October 1983

## A Project With Potential To Spread Non-A, Non-B Hepatitis In West Africa

The International Primate Protection League has learned with concern of proposals submitted by the IMMUNO AG Company of Austria to the Government of Sierra Leone, West Africa, regarding the company's plans to establish a chimpanzee research facility in Sierra Leone, West Africa.

According to a statement dated August 23, 1982 submitted to the Government of Sierra Leone by Klaus Bieber, Austrian Consul in Sierra Leone, the animals would be used in hepatitis non-A, non-B research and testing of hepatitis B vaccine. The purpose of establishing the facility in Africa was stated to be "to avoid the problems involved with the importation of live chimpanzees." Presumably, these "problems" include national and international laws and treaties regarding the movement of live animals belonging to endangered species. The chimpanzee *Pan troglodytes* is listed in Appendix I of the Convention on International Trade in Endangered Species.

Besides getting round restrictions on the international movement of chimpanzees, cheapness of wild-caught chimpanzees appears to be a motivating factor for the IMMUNO Company. According to the Austrian newspaper *Presse* (February 3, 1983), Immuno official Johann Eibl stated that captive breeding of chimpanzees was not an economically viable proposition.

The proposed facility would procure 60-80 chimpanzees per

year, to be obtained from the wild. However, according to Bieber's statement, "it must be emphasised [*sic*] that the research will not bring about a decimation of chimpanzees: on the contrary, their numbers would remain stable." Readers familiar with the destructive method by which chimpanzees are caught (killing of mothers in most cases) may be surprised at this statement. However, Bieber cheerfully explains the non-detriment theme by saying, "Because, after going through a research circle of about 3 years, the animals will be in perfect condition and ready for rehabilitation into the wild."

The International Primate Protection League is concerned over IMMUNO's plans on many grounds; to cite just a few of them:

1. Release of chimpanzee "veterans" of hepatitis non-A non-B research would be hazardous to wild populations, as there is no way to determine that an animal is definitely not a carrier of the disease. Should release of carrier animals occur, hepatitis could well spread among wild chimpanzees over large parts of Africa. Thus chimpanzees could well become a reservoir for hepatitis just as bats are a reservoir for rabies. The result might be increased human persecution of chimpanzees.

2. Although chimpanzee rehabilitation has acquired a certain "chic," it is known that wild chimpanzees attack introduced newcomers. For this reason, chimpanzees in the Mount Asserik project in Senegal directed by Stella Brewer had to be recaptured and released on islands in the River Gambia with no resident chimpanzees. As yet, no permanent home has been located for these animals. The rehabilitation procedures take many years per animal and are extremely costly and hence not feasible on the scale that would be required to start 60-80 animals per year on rehabilitation. Assuming a 5-year training per animal, there could be up to 400 animals undergoing rehabilitation at any given time, at the cost of millions of dollars annually. It is questionable whether, in spite of the most dedicated efforts, any rehabilitated chimpanzees will become totally normal, since they are usually removed from the wild at 1-2 years of age and thus miss the most critical years of their social development.

3. Capture of wild chimpanzees for research is in clear

violation of the World Health Organization's 1982 statement on the procurement of primates for biomedical research. Chimpanzees are listed in the Red Data Book of the International Union for the Conservation of Nature as "vulnerable." The WHO statement "strongly recommends" that endangered, vulnerable, and rare species be considered for use in biomedical research projects only if they are obtained from *existing* [emphasis added] self-sustaining captive breeding colonies (i.e., captive-breeding all animals required to at least the F-2 generation).

4. Currently, there are over 1,000 chimpanzees in US laboratories as well as large numbers in the Netherlands, Poland, Liberia, etc. These animals should be enough to supply any legitimate requirements for chimpanzees.

The International Primate Protection League shares the scientific community's concern over hepatitis. However, we feel that a way can and must be found to solve this problem without recourse to the dwindling populations of wild chimpanzees. Therefore, we appreciate the opportunity to draw this situation to the attention of interested parties.

Shirley McGreal, MD
Chairwoman
International Primate Protection League
P.O. Draw X
Summerville, SC 29483

LETTER TO THE EDITOR
FROM DR. ALFRED PRINCE
AS IT APPEARED IN THE
*JOURNAL OF MEDICAL PRIMATOLOGY*

## Letter to the Editor

As one who is responsible for a colony of chimpanzees housed in West Africa, some of which have been exposed to non-A, non-B (NANB) viruses, I believe that it may be useful to comment on the recent letter by Dr. Shirley McGreal which was published in this journal (12:280-281, 1983).

First, I would agree that a plan to obtain 60-80 chimpanzees from the wild in Sierra Leone is unrealistic and would further endanger the existing already threatened wild populations. Wild chimpanzee populations in the region are dwindling, and capture of infants would inevitably result in death of mothers and other chimpanzees. Furthermore, Dr. McGreal is correct in stating that rehabilitation and release to the wild of 60-80 chimpanzees per year is unrealistic.

In our facility, Vilab II at the Liberian Institute of Biomedical Research, we have embarked on such a program. Animals are first released in groups of 10-20 on 10-20-acre islands. This cannot generally be done until animals are an average of 6-8 years of age. Wild-born animals, previously resocialized into large groups, adjust well to life on these islands. They rapidly learn to nest and to forage, it is then necessary to keep these groups on islands until they have formed a sufficiently cohesive group, and have become physically mature and strong enough to withstand the hostility of wild chimpanzees if these are met following release to the wild. We feel that this will require an additional 3-5 years.

An additional factor that must be considered is, first, the fact that suitable islands for rehabilitation are relatively scarce, and these must be provisioned; and second, that suitable final release sites are also scarce. The latter must be in "protected habitats" ie, properly supervised National Parks, and must have low populations of wild chimpanzees.

Initially, the success of release programs must be monitored by wildlife biologists using telemetry. There is no question that a conscientious release program is arduous and expense.

The problem of releasing animals who carry non-A, non-B viruses is an important one. Our experience, and that of others, about 25-50% of animals exposed to live NANB viruses carry the agent for more than one year. It is not yet known how many will still be carriers for long periods of time, although some animals have been shown to harbor the virus for over 5 years. Generally animals that carry this virus will have abnormalities in levels of liver transaminases, as well as characteristic ultrastructural changes visible by electron microscopic examinations of liver biopsies.

We presently require that the above parameters must be completely normal for a period of 2 years before an animal can be considered for release. Subinoculation of serum from such animals has not so far revealed them to be infectious; however, more such tests need to be done. We plan eventually to place animals with continuing evidence of NANB infectious islands for long-term care.

It is not likely that chimpanzees will ever become a significant reservoir of NANB infection that could pose a hazard for man. These viruses are poorly transmissible, requiring either intimate (sexual) contact or blood transfusion. Furthermore, NANB viruses are common in human populations throughout the world. About 3% of the U.S. voluntary blood donor population is estimated to carry these viruses.

It is my feeling that future studies on NANB hepatitis in chimpanzees should be as limited as possible in number and, further, should utilize already captive chimpanzees or their offspring.

Alfred M. Prince, M.D.
Lindsley F. Kimball Research Institute
of the New York Blood Center
New York, NY

**Plaintiff's Exhibit 99**

(Letterhead of)
Dr. Franz Sitter's Zoological Station

FREETOWN-SIERRA LEONE

P.O. BOX 262 PHONE: 23634
22nd April, 1981

Prof. Jankowski,
New York University Medical Center,

550 First Avenue,
New York, N.Y. 10016,
U. S. A.

Dear Professor,

I am in receipt of your letter dated 17th March, and I write this letter myself personally. I can assure you that there is definitely nobody in my surrounding who would pass on any information to Teleki and it only could be that Dr. Prinz played a funny game. May I inform you about the latest development in Sierra Leone. Government invited me to a Committee in which the future of the animal trade can be discussed, because it is a fact that a good number of Chimps and other animals are caught every year accidentally and if we cannot export all these animals and babies, they will die and nobody in Sierra Leone is really supporting this, only a few Conservationists want that we stop to buy these animals which are already on the market because they think if we dont buy the people will stop trapping. As soon as this Committee have reached a decision, I will let you know and in the meantime dont take it serious what Mr. Teleki has to say, because he is not an expert on Wild Life in Sierra Leone, because the area which he covered during his stay here is less than 10% of the whole country.

I would really appreciate if somebody would join me in this Breeding Station for Chimps, but Prinz is the wrong fellow, because he want to do the samething as a competitor to me in

Liberia. It is a pity that some people concern in this Wild Life problems try to solve these questions with a lot of emotional feeling and talk. For example Prof. Teleki said in public in a hotel in Sierra Leone that it is better if we let 200 baby Chimps die every ye year than to allow the export of these animals. Is this not stupid? Such a man call himself a Conservationist. In my opinion the first thing what we have to do is to save the lives of all these unfortunate animals which are trapped and later on we have to think about what we can do with them, but to say that these animals shall die is to me incredible and unacceptable.

Dear Professor take everything easy and dont take Teleki serious. I am sure we will find a solution to the problems which will benefit the Chimps more than Teleki's ambition. With my best regards I remain,

Sincerely Yours,

Franz Sitter

p/s written by me personally without copy.

**Plaintiff's Exhibit 100**

(Letterhead of)

**NEW YORK UNIVERSITY MEDICAL CENTER**

550 First Avenue, New York, N.Y. 10016
Area 212 340-6626 or 679-8884

Laboratory for Experimental Medicine and Surgery
in Primates (LEMSIP)

10 June, 1981.

Mrs. Judith Newfield
45 Sutton Place South - Apt. 20I
New York, N.Y. 10022.

Dear Mrs. Newfield:

We have had excellent experience prior to the U.S. joining the CITES Convention, in importing chimpanzees from Sierra Leone through the good services of Dr. Franz Sitter who is an Austrian and has a doctorate of Parasitology from his home country.

I am enclosing a letter from Dr. Sitter of 22 April which is self-explanatory. A recent quotation I had from Dr. Sitter on the price of chimpanzees for exportation was $2,000.

Yours very sincerely,

/s/

J. Moor-Jankowski, M.D.

**Plaintiff's Exhibit 101**

(Letterhead of)

**NEW YORK UNIVERSITY MEDICAL CENTER**

550 First Avenue, New York, N.Y. 10016
Area 212 340-6626 or 679-8884

Laboratory for Experimental Medicine and Surgery
in Primates (LEMSIP)

10 June, 1981.

Dr. Franz Sitter
P. O. Box 262
Freetown, Sierra Leone.

Dear Dr. Sitter:

Thank you for your letter of 22nd April. Pressure of time has not allowed me to answer you immediately but I have written to our friends in the Institut Pasteur to encourage them to develop a program with you.

On your behalf I have also contacted Mrs. Newfield today, the American representative of an Austrian firm, IMMUNO, who are interested in the importation of chimpanzees to Austria, copy enclosed.

I am keeping in mind your proposal of breeding chimpanzees in Sierra Leone and you may be assured I will do my best to be of help keeping in mind the good services you have rendered us in the past.

Yours very sincerely,
/s/
J. Moor-Jankowski, M. D.

cc: Mrs. Newfield

**[Submitted from Moor-Jankowski document production as Exhibit EE to Fersko Affidavit of Evidence Adduced in Opposition to Motion for Summary Judgment, sworn to December 31, 1986]**

MINUTES OF MEETING HELD AT THE HONOURABLE MINISTER'S OFFICE ON MONDAY 18TH APRIL
WITH A REPRESENTATIVE OF IMMUNO AG AN
AUSTRIAN PHARMACEUTICAL FIRM

PRESENT

Dr Abass C. Bundu - Ministry of Agriculture and Forestry
Hon. Ibrahim Sarie - P.S.A.(I) M.A.F.
Mr. M. B. D. Feike - Chief Conservator of Forests
Mr. A. P. Koroma - Deputy Chief Conservator of Forests
Dr. Masson - Deputy Chief Veterinary Officer
Dr. Gerald Eder, IMMUNUO Representative
Mr. Klaus Beiber - Hon. Austrian Consul
Mr J. B. Paul-Short - Deputy Secretary, M.A.F.
Mr. A. B. M. Kamara - Deputy Secretary, Min. of Natural Resources

The Hon. Minister welcomed all present and observed that the matter had been under consideration for a long time. He said he hoped that during the ensuing discussions all the issues involved would be resolved. He then requested Dr. Eder, Immuno Representative to explain precisely what the project is all about.

Dr. Eder disclosed that IMMUNO AG had already developed vaccines to combat HEPATITIS (inflammation of the liver) and planned to test the vaccines on chimpanzees here in Sierra Leone. He said what they had in mind was to establish a Research Station to monitor the safety of the vaccines. Another aspect of the project, he claimed, would entail the rehabilitation of the chimpanzees again into wild life. He said he was confident that the firm would be able to obtain funds from the Austrian Government for the project.

The Minister thanked him succinct exposition of the objectives of the project but said he would like elucidation of some points.

| | | | |
|---|---|---|---|
| i. | Question | - | Why was Sierra Leone chosen? |
| | Reply | - | Dr Eder said the firm knew the Hon. Consul and there existed cordial relationship between Sierra Leone and Austria which was recently strengthened by Austrian assistance in the rehabilitation of Marampa Iron-ore mines; |
| ii. | Question | - | Why the research is not done in Austria? |
| | Reply | - | Additional research work would be done in Austria on chimpanzees. |
| iii. | Question | - | Is there any guarantee that rehabilitation of the chimpanzees into wild life would not create any health hazards? |
| | Reply | - | Dr Eder emphatically stated that there was none, he said the only risk involves carriers and these, he promised, would not be released. |
| iv. | Question | - | In view of the fact that the Firm has not had any prior experience on the likely consequences the animals might have on human beings and has not operated a station as the one in Liberia anywhere in Africa how can they be certain that there are no attendant health hazards? |
| | Reply | - | They do not envisage any problems, and rehabilitation would take place on an uninhabited island or isolated area. |

v. Question - The Chief Conservator of Forests wanted to know what would be the Firm's responsibility during rehabilitation - and what was the success rate of rehabilitation?

Reply - Rehabilitation would be the complete responsibility of the Firm. The animals would be released in an area where there are plenty of fruits, natural or planted, and encouraged to dehumanise gradually (to fend for themselves) over a considerable period of time before rehabilitation into wild life.

vi. Question - Dr. Massan asked whether the vaccines to be tested are in the initial or final stage.

Reply - The vaccines are in the final stage, would be tested on the chimpanzees before they are tested on human beings.

The Minister further opined that if what they intend to do is to follow the American example in Liberia the Project would create a colony of new breed of animals that are not wanted by their own kind nor by men. Consequently, the proposal would not be totally exempt from opprobrium by World Wild Life Organisations. He said his reluctance to readily support the proposal was motivated by the desire not to embrace a project that was most likely and susceptible to criticisms from Wild Life Organisations. In this regard he requested that a report be submitted to him endorsed by the Liberian Government confirming the success of the rehabilitation programme.

Since a fairly large number of animals would be required it was agreed that the Project should start with a small number of animals and undertake breeding while proceeding with the experiment, in other words, breeding and research should proceed simultaneously in order not to render chimpanzees an endangered

species in Sierra Leone.

The Firm's Representative faithfully promised that they would permit international inspection of the Project by WHO, Ministry of Health etc., to monitor their activities.

The Representative was finally requested to spell out the benefits Sierra Leone would derive from supporting the project. The Firm would support and assist in health matters regarding hepatitis, provide vaccines for polio etc. We conceded that royalties could be negotiated on successful outcome of the projects as they hope to capture between 20 and 25% of the market if the project succeeds.

The Minister thanked the Austrians and invited them to another meeting at 5.00 p.m. on Thursday 21st instant when he hoped Cabinet would have considered the matter.

/s/
J S Paul-Short
Ag. Deputy Secretary

20 April, 1983

**Plaintiff's Exhibit 60A**

*The Secretary to the President*

Austrian Request To Establish A Hepatitis Research Institute

Dr. Gerald Eder, representing a private pharmaceutical company in Austria, IMMUNO AG, Vienna, came to se me on Monday, 18 April. The Austrian Consul in Freetown, Mr. Klaus Bieber, was also present. The purpose of Dr. Eder's visit was to explore with my Ministry the possibility of his company setting up in Sierra Leone a hepatitis research institute which would carry out experiments with local chimpanzees which have been found to be the only animals capable of contracting hepatitis biochemically and liver-histologically without getting ill. The experiments would aim at further research into viral hepatitis and the development of prophylactic and therapeutical substances for this disease. More specifically, the research would seek to -

(a) clarify the epidemiology of hepatitis and check the safety of plasma fractions;

(b) develop inactivation procedures of Non-A/Non-B Hepatitis viruses in plasma fractions; and

(c) prove the potency and safety of the Hepatitis B as well as of the Non-A/Non-B Hepatitis Vaccines.

We have carefully examined the research and wish to start to point out some of the issues involved for the consideration of His Excellency The President.

(i) *Should we agree to the request at all?*

In principle, my Ministry has no objection to the establishment of a hepatitis research institute in Sierra Leone for the reasons that it could, if the research is successful, enable Sierra Leone to make an important contribution to the international search for an appropriate cure for the dreaded disease of hepatitis. It is a disease which is common in the continents of Europe,

America and Asia and is also found in Africa. Its control and eradication has been a major pre-occupation of WHO. I also understand from the Austrian Consul that the Ministry of Foreign Affairs had indicated, on 4 October 1982, that it had no objection in principle to the establishment of the research institute and that an Agreement be concluded between the Governments of Sierra Leone and Austria for the realisation of the project.

(ii) *What should be the terms and conditions?*

My Ministry holds the view that the following terms and conditions must first be agreed before official permission can be granted for the establishment of the research centre:

(a) Incorporation of a local company - The research centre must be a private company to be incorporated in Sierra Leone. The Austrian company has agreed to this suggestion and has proposed the name IMMUNO RESEARCH CENTRE SIERRA LEONE LIMITED.

(b) Safety requirements - Since the centre would be experimenting with viruses and vaccines, we must assume that there is a potential danger to human health; Consequently, the Ministry of Health and WHO will be contacted to curry out inspections of the centre from time to time in accordance with WHO regulations on such research matters.

(c) Provision of chimpanzees to the centre - The Austrian company is asking for about 60 to 80 chimpanzees a year. I have been advised that the provision of such a large number would seriously deplete our national stock of wild chimpanzees who are increasingly becoming rare and we therefore cannot give such a number. Moreover, it would expose Sierra Leone to international criticism from international wildlife organizations some of which have local representatives in Sierra Leone. Accordingly, we have proposed instead, and Dr. Eder has agreed, that a breeding farm should be established by the centre for experimental purposes. However, to enable the centre to start its operations, we would consider giving a small number of about 50 to 60 out of which the Centre could start its breeding programme whilst simultaneously carrying out experiments on a small scale in

the first year of operation. By the second and third years, the Centre would procure its supplies from its own breeding farm.

Incidentally, the main reason why the Austrians are proposing to establish the Centre in Sierra Leone is precisely because they would not otherwise be able to import chimpanzees into Austria by virtue of the Washington Agreement for the Protection of Endangered Species in Flora and Fauna to which Sierra Leone and Austria are both signatories.

(d) *Location of Research Centre* - The local company to be incorporated as proposed in (a) above will acquire private land for the erection of the research centre, and all the expenses will be met by the local company from funds remitted by the parent company in Austria. However, my Ministry is of the firm opinion that the centre should be located near Freetown. Dr Sitter is already engaged in activities involving wildlife, including chimpanzees. Instead of proliferating such activities, with the resultant depletion of the number of chimpanzees in the country, Dr Sitter could be brought into the arrangement and he has already shown a keen interest in the matter. His farm is located at Rokel, near Freetown. Moreover, by locating the breeding farm and centre near Freetown, we would be providing a facility for tourist attraction. I say all this because we understand that the Managing Director of the Marampa Mines is trying to persuade the Austrians to locate the centre at the Mines but in fact the Austrian pharmaceutical company has no connection whatever with the Austrian company involved in the Marampa Mines.

(e) *Benefits to Sierra Leone* - The Austrian company will be sending at least three research doctors specializing in the treatment of hepatitis. Dr Eder has agreed to our proposals to put these doctors at the disposal of the Ministry of Health to assist with the treatment of hepatitis in Sierra Leone as well as make available to that Ministry the results of their research.

Moreover, Dr Eder has agreed that royalties will be paid to the Sierra Leone Government on any vaccines discovered

and sold locally or abroad.

I would further recommend that, subject to proper management and supervision of the activities of the Centre, His Excellency The President might wish to consider associating himself with the research. The success of the research would enable Sierra Leone to make an important contribution to the worldwide fight against hepatitis without endangering the population of chimpanzees in the country. This would yield handsome political and diplomatic dividends to His Excellency. Furthermore, the Sierra Leonean staff would benefit from training programmes both locally and overseas.

(f) *Rehabilitation of Animals* - The company had in mind transferring the chimpanzees after the experiment to some isolated uninhabited island for rehabilitation purposes. We did not think this was a sound proposal: first wild animals domesticated normally do not revert to their natural habitat easily, nor are they usually accepted back by their own kind. In fact their fate is invariably death; secondly,putting them on an island would be tantamount to founding a new animal colony entirely for the returnees - an environment which would certainly not be natural; thirdly, there is the risk of transmission of viruses acquired during the experimentation; and finally, there are no isolated uninhabited islands as such since nearly all our islands are frequently visited by artisanal fishermen. For all these reasons, we rejected the idea and suggested instead that a breeding farm be established by the Centre.

(g) *Concessions* - The Austrian company also asked for duty free concessions for equipment, fittings and materials to be imported for the Centre. My Ministry has no objection to this request being granted provided the company can itemise in precise terms the materials envisaged. It also asked for exemption from export duty of blood samples, tissue samples and any other material necessary to carry on the research in the establishment of the parent company in Austria. Again, we have no objection provided this would not be used as an outlet for removing the results of the research and thus deny Sierra Leone both the credit and the royalty to be paid on the vaccines which it is hoped to be discovered.

In the light of all the foregoing comments, I recommend for the approval of His Excellency in principle for the establishment of a hepatitis research centre and breeding farm in the Rokel area near Freetown by a company to be locally incorporated by the Austrian company, IMMUNO AG. subject to the terms and conditions indicated above. After His Excellency's approval is received, I shall submit a formal memorandum to Cabinet.

Abass Bundu (Dr)
Minister of Agriculture & Forestry and Acting
Minister of Natural Resources
20 April 1983

**Plaintiff's Exhibit 63**

**[Letterhead of Immuno AG]**

Dr. J. Moor-Jankowski
Journal of Medical Primatology
c/o LEMSIP
New York University
Medical Center
550 First Avenue
New York, N.Y. 10016
USA

Vienna, Feb. 22, 1983

JE/ma

Dear Dr. Moor-Jankowski:

I confirm the receipt of your letter dated November 9, 1983, which arrived here on February 17, 1983 with registered mail, as well as the attached copy of a letter of the International Primate Protection League to your Journal.

Since, as you have mentioned in your letter, the Editor in Chief considers this matter of highest importance, he certainly will seek unbiased scientific advise, which you, as Head of LEMSIP, with your vast experience in this field and so well aware of all problems involved, can certainly provide.

As far as the non-scientific side of this letter of the International Primate Protection League is concerned, we decided to inform our lawyers in New York.

We consider your information as very helpful.

Yours Very Sincerely,
IMMUNO AG

/s/

Dr. H. Eibl

(2)

Supreme Court, U.S.
FILED
MAY 10 1991
OFFICE OF THE CLERK

No. 90-1579

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1990

IMMUNO, A.G.,

*Petitioner,*

vs.

DR. JAN MOOR-JANKOWSKI,

*Respondent.*

PETITION FOR A WRIT OF CERTIORARI
TO THE NEW YORK STATE COURT OF APPEALS

## BRIEF OF RESPONDENT DR. JAN MOOR-JANKOWSKI IN OPPOSITION TO IMMUNO A.G.'S PETITION FOR A WRIT OF CERTIORARI

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## COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether, when considering if a letter to the editor on a matter of public concern is constitutionally protected under *Milkovich v. Lorain Journal Co.*, 497 U.S. ____, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990), a substantial federal question is presented by the determinations of a state court, in a state common law libel action, that the letter does *not* contain any express or implied false defamatory statement of fact?

2. Whether under *Michigan v. Long*, 463 U.S. 1032 (1983), this Court has jurisdiction to review a state court decision dismissing a state common law action for libel, when the state court decision indicates clearly and expressly that it is based on bona fide separate, adequate, and independent state constitutional or common law grounds?

## COUNTER-STATEMENT OF THE PARTIES TO THE PROCEEDING

Petitioner Immuno Aktiengesellschaft für Chemisch-Medizinisch Produkte ("Immuno A.G.") is a commercial corporation organized and existing under the laws of Austria, having its principal office in Vienna, Austria, and having affiliated companies in approximately 30 different countries. Immuno A.G. manufactures, for commercial sale, biologic products derived from human blood. (Pet. App. 2, 60)[1]

Respondent Dr. Jan Moor-Jankowski is a professor of medical research at the New York University Medical School, the Director of the New York University Medical School's Laboratory for Experimental Medicine and Surgery in Primates ("LEMSIP"), the Director of the World Health Organization Collaborating

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[1] Immuno A.G.'s description of itself (Pet. i, 4) makes certain claims about its AIDS research that are not found in the record below, that are not otherwise known by respondent and that, to respondent's knowledge, have not been published in refereed scientific literature.

Center for Hematology of Primate Animals and the unpaid editor-in-chief of the *Journal of Medical Primatology*. (Pet. App. 2, 60) Dr. Moor-Jankowski (M.D., Berne University, Switzerland) is, as noted by the New York Appellate Division, a "universally acknowledged authority on the use of primates in biomedical research" (Pet. App. 60) and, specifically, is the recipient of the Geneva University "Prix Arthur de Claparde," a citation and medal from the Soviet Academy of Medical Sciences, the Trumpeldor Medal from the Prime Minister's Office of the State of Israel, the G. Bude Medal of the College de France in Paris and the French National Order of Merit for his scientific achievements and his Resistance activities during World War II. (Resp. App. 3-7)[2]

[2] Immuno A.G.'s contrived statement of the parties mischaracterizes Dr. Moor-Jankowski as a businessman-competitor of Immuno A.G. and ignores Dr. Moor-Jankowski's full-time university position and the fact that the laboratory directed by him, LEMSIP, is an integral part of the New York University Medical Center, a not-for-profit educational institution.

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## COUNTER-STATEMENT ON JURISDICTION

Immuno A.G. fails to raise a substantial federal question as required under 28 U.S.C. § 1257 in its arguments attacking the determinations of the New York Court of Appeals that the Letter to the Editor in this case does not contain any express or implied false defamatory fact, and therefore is constitutionally protected under *Milkovich v. Lorain Journal Co.*, 497 U.S. ____, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990); and this Court lacks jurisdiction under Article III because the New York Court of Appeals expressly decided the case on a bona fide separate, independent and adequate state constitutional ground, *see Michigan v. Long*, 463 U.S. 1032 (1983).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

Article III of the United States Constitution, the First Amendment to the United States Constitution, the Fourteenth Amendment to the United States Constitution, 28 U.S.C. § 1257(a), Section 8 of Article I of the New York State Constitution, and Section 3212 of the New York Civil Practice Law and Rules ("CPLR") are set forth in pertinent part in Respondent's Appendix. (Resp. App. 1)

## COUNTER-STATEMENT OF THE CASE

### I. *The Facts.*

Immuno A.G.'s petition, avoiding quotation of the Editorial Note and the Letter to the Editor here involved, brazenly distorts the Letter and misstates the pre-publication facts contrary to the determinations of the New York Appellate Division and Court of Appeals after their careful review of the record. *See* Supreme Court Rules 15.1.[3]

Dr. McGreal's Letter to the Editor and a prefatory Editorial Note by Dr. Moor-Jankowski were published in the December 1983 edition of the *Journal of Medical Primatology*.[4] In view of the

---

[3] *See* pp. 17-22, *infra*.

[4] Immuno A.G.'s petition fails to acknowledge that the author of the Letter to the Editor, Shirley McGreal, is respected by prominent scientists and U.S. Government officials. (*See* Resp. App. 8-9)

importance of the complete texts of these documents in considering "general tenor" as a matter of federal law (*Milkovich v. Lorain Journal Co.*, 497 U.S. at ____, 110 S.Ct. at 2707), and "the content of the whole communication" as a matter of state law (Pet. App. 17), the entire texts are here presented.

The Editorial Note states: _

> In January 1983, the Editors of the *Journal of Medical Primatology* received a letter from Dr. Shirley McGreal, Chairwoman of the International Primate Protection League, alerting the biomedical community to a new attempt to establish another chimpanzee research laboratory in Africa. This was seen by Dr. McGreal as a violation of the World Health Organization's 1982 statement on the procurement of primates for biomedical research, and as a way to avoid the Convention on International Trade in Endangered Species (CITES).
>
> The Editors submitted Dr. McGreal's letter for "comments or reply" to IMMUNO A.G. in Vienna, Austria which had been mentioned as the company interested in establishing the laboratory. IMMUNO acknowledged the receipt of the letter on February 17, 1983, but provided no comments, referring the matter to their lawyers in New York. The lawyers requested that the *Journal of Medical Primatology* provide them with the documents on which Dr. McGreal's accusations were based; they termed the statements to be wholly inaccurate and reckless. They further stated (March 3rd, 1983, letter from Goldschmidt, Fredericks & Oshatz, New York): "We would also like to advise you that our review of Dr. McGreal's letter indicates that it is not a fair comment regarding our client's activities, and should you proceed with publication, without giving us the opportunity for a meaningful response, we shall be compelled to take whatever actions we deem necessary to redress our client's rights."
>
> The Editors advised the law firm that Dr. Shirley McGreal should be contacted directly for access to the original documents, and they extended the period for receiving the

rebuttal to April 20, 1983. During that period no additional information was received from IMMUNO or from their lawyers, but in the meantime, the matter was discussed in the Austrian press, and Dr. McGreal feels that these newspaper articles confirmed the contents of her letter. The final text of Dr. Shirley McGreal's letter of March 23, 1983, reflects the discussion in the Austrian press which occurred after her initial letter of January 30th was submitted for publication and this final letter is printed below.

(Pet. App. 149-150)

Dr. McGreal's Letter to the Editor was entitled "A Project With Potential to Spread Non-A Non-B Hepatitis in West Africa." It states:

The International Primate Protection League has learned with concern of proposals submitted by the Immuno A.G. Company of Austria to the Government of Sierra Leone, West Africa, regarding the company's plans to establish a chimpanzee research facility in Sierra Leone, West Africa.

According to a statement dated August 23 1982, submitted to the Government of Sierra Leone by Klaus Bieber, Austrian Consul in Sierra Leone, the animals would be used in hepatitis non-A, non-B research and testing of hepatitis B vaccine. The purpose of establishing the facility in Africa was stated to be "to avoid the problems involved with the importation of live chimpanzees." Presumably, these "problems" include national and international laws and treaties regarding the movement of live animals belonging to endangered species. The chimpanzee *Pan troglodytes* is listed in Appendix I of the Convention of International Trade in Endangered Species.

Besides getting round restrictions on the international movement of chimpanzees, cheapness of wild-caught chimpanzees appears to be a motivating factor for the Immuno

Company. According to the Austrian newspaper *Presse* (February 3, 1983), Immuno official Johann Eibl stated that captive breeding of chimpanzees was not an economically viable proposition.

The proposed facility would procure 60-80 chimpanzees per year, to be obtained from the wild. However, according to Bieber's statement, "it must be emphasized that the research will not bring about a decimation of chimpanzees: on the contrary, their numbers would remain stable." Readers familiar with the destructive method by which chimpanzees are caught (killing of mothers in most cases) may be surprised at this statement. However, Bieber cheerfully explains the nondetriment theme by saying: "Because after going through a research circle of about 3 years, the animals will be in perfect condition and ready for rehabilitation into the wild."

The International Primate Protection League is concerned over Immuno's plans on many grounds; to cite just a few of them:

1. Release of chimpanzee "veterans" of hepatitis non-A, non-B research would be hazardous to wild populations, as there is no way to determine that an animal is definitely not a carrier of the disease. Should release of carrier animals occur, hepatitis could well spread among wild chimpanzees over large parts of Africa. Thus chimpanzees could well become a reservoir for hepatitis just as bats are a reservoir for rabies. The result might be increased human persecution of chimpanzees.

2. Although chimpanzee rehabilitation has acquired a certain "chic," it is known that wild chimpanzees attack introduced newcomers. For this reason, chimpanzees in the Mount Asserik project in Senegal directed by Stella Brewer had to be recaptured and released on islands in the river Gambia with no resident chimpanzees. As yet, no permanent home has been located for these animals. The rehabilitation procedures take many years per animal and

are extremely costly and hence not feasible on the scale that would be required to start 60-80 animals per year on rehabilitation. Assuming a 5-year training per animal, there could be up to 400 animals undergoing rehabilitation at any given time, at the cost of millions of dollars annually. It is questionable whether, in spite of the most dedicated efforts, any rehabilitated chimpanzees will become totally normal, since they are usually removed from the wild at 1-2 years of age and thus miss the most critical years of their social development.

3. Capture of wild chimpanzees for research is in clear violation of the World Health Organization's 1982 statement on the procurement of primates for biomedical research. Chimpanzees are listed in the Red Data Book of the International Union for the Conversation of Nature as vulnerable. The WHO statement "strongly recommends" that

> endangered, vulnerable, and rare species be considered for use in biomedical research projects only if they are obtained from *existing* [emphasis added] self-sustaining captive breeding colonies (*i.e.*, captive-breeding all animals required to at least the F-2 generation).

4. Currently, there are over 1,000 chimpanzees in US laboratories, as well as large numbers in the Netherlands, Poland, Liberia, etc. These animals should be enough to supply any legitimate requirements for chimpanzees.

The International Primate Protection League shares the scientific community's concern over hepatitis. However, we feel that a way can and must be found to solve this problem without recourse to the dwindling populations of wild chimpanzees. Therefore, we appreciate the opportunity to draw this situation to the attention of interested parties.

Shirley McGreal, M.D.
Chairwoman
International Primate
Protection League
P.O. Drawer X
Summerville, SC 29483

(Pet. App. 150-152)[5]

II. *The Proceedings.*

On December 14, 1984, Immuno A.G. served its complaint alleging libel and *prima facie* tort against Dr. Moor-Jankowski (and others no longer in this case) complaining about the McGreal Letter and an article in the *New Scientist*. After extensive discovery, Dr. Moor-Jankowski moved for summary judgment. In an opinion dated August 6, 1987, the motion court granted the motion as to the *prima facie* tort claim but denied it as to the libel claim.

The Appellate Division reversed in an opinion and order dated January 17, 1989. (Pet. App. 59-88) "After a thorough review" of the record, the Appellate Division concluded "that the statements contained in the [McGreal] letter and *New Scientist* article are not actionable and that the defendant [Dr. Moor-Jankowski] is entitled to summary judgment dismissing the complaint." (Pet. App. 64-65) The Appellate Division reasoned that the Letter's:

> . . . ultimate objective was to express certain opinions which, while highly critical of plaintiff's proposal, did not rise to the level of outright accusations of wrongdoing. It was, moreover, the case that the factual assertions upon which McGreal's opinions rested were evidently true . . .

---

[5] A couple of months after the publication of Dr. McGreal's Letter, Dr. Alfred Prince, the Director of Virus Research at the New York Blood Center and the discoverer of hepatitis non-A/non-B, wrote a letter to the editor of the *Journal of Medical Primatology* concerning Immuno A.G.'s proposed Sierra Leone project. Dr. Prince called the Immuno A.G. plan "unrealistic" in proposing to take 60 to 80 animals annually from the wild, because wild chimpanzee populations were dwindling and capture of chimpanzee infants inevitably resulted in death of chimpanzee mothers, and in proposing to return to the wild the chimpanzees used in hepatitis non-A/non-B research. Like Dr. McGreal, Dr. Prince recommended use of captive or captive-bred chimpanzees for research. (Pet. App. 153-154) Dr. Andrew Rowan, Assistant Dean of Tufts University School of Veterinary Medicine, also wrote a letter to the editor agreeing with Dr. Prince's statement of concerns and commenting further that establishing a laboratory in a country where chimpanzees are naturally found "as a ploy to avoid the barriers against trade in endangered species is not . . . . . ethical or responsible . . ." (Resp. App. 10)

(Pet. App. 65) Based on a lengthy analysis, the Appellate Division held that the statements contained in the McGreal Letter were either constitutionally protected opinion or were factual statements as to which Immuno A.G. had failed to come forward with evidence to satisfy the constitutionally imposed burden of proving falsity (Pet. App. 65-88), and indeed, that the record showed in most instances to be "demonstrably true!" (Pet. App. 88; exclamation in original) The Appellate Division also held that certain complained of statements in the *New Scientist* attributed to Dr. Moor-Jankowski, particularly that Immuno A.G.'s proposal was "scientific imperialism", were constitutionally protected opinion. (Pet. App. 87)

The New York Court of Appeals, in an opinion by Judge Judith Kaye and order dated December 14, 1989, unanimously affirmed summary judgment, holding that the publications at issue were protected under both the Federal and State Constitutions and thus not properly the subject of a libel suit. (Pet. App. 35-44) The Court specifically held that "the Appellate Division's extensive analysis of the record amply established that [Immuno A.G.] raised no triable issues of fact as to the falsity of the threshold assertions of [the Letter to the Editor]" (Pet. App. 42), and pointed to this case as an example of the "chilling effect" of libel litigation on free speech, remarking: "That chilling effect can be especially severe for scholarly journals, such as [Dr. Moor-Jankowski's]. ..." (Pet. App. 43-44). In the view of the Court of Appeals, "hypertechnical parsing of possible 'fact' from its plain context of 'opinion' loses sight of the objective of the entire exercise, which is to assure that – with due regard for the protection of individual reputation – the cherished constitutional guarantee of free speech is preserved." (Pet. App. 44).

Immuno A.G. moved to reargue, principally complaining that the Court of Appeals had erred in finding that "plaintiff's allegations of a deliberate effort, or conspiracy, to smear its reputation are entirely conclusory, and therefore do not preclude summary judgment in defendant's favor." (Pet App. 43) By order dated February 15, 1990, the Court of Appeals denied that motion. (Pet. App. 90; *see also* Pet. App. 99)

Subsequently, this Court granted certiorari in *Milkovich* to review the grant of summary judgment by the Ohio state court dismissing a libel action by a high school wrestling coach against a newspaper and its columnist on the ground that complained of statements were constitutionally protected opinion. This Court reversed in an opinion by Chief Justice Rehnquist. Stating that under the First Amendment there was not a wholesale exemption for anything that might be labelled "opinion", Chief Justice Rehnquist held that the "dispositive question" was whether "a reasonable factfinder could conclude that the statements in the [complained of] column imply an assertion that petitioner Milkovich perjured himself in a judicial proceeding." (497 U.S. at ____, 110 S.Ct. at 2707) Answering in the affirmative, Chief Justice Rehnquist reasoned (1) that as the Ohio Supreme Court itself had observed, the clear impact of the language was an accusation that Milkovich had committed perjury; (2) that loose, figurative, or hyperbolic language was not used; (3) that the "general tenor" of the article did not negate the impression of a charge of perjury; and (4) that the charge of perjury was sufficiently factual to be susceptible of being proved true or false. (*Ibid.*)

Shortly after *Milkovich* was decided, this Court granted Immuno A.G.'s then pending petition for certiorari, vacated the initial order of the New York Court of Appeals affirming summary judgment dismissing the complaint, and remanded this case back to the New York Court of Appeals "for further consideration in light of *Milkovich*". (Pet. App. 92-93)

On remand, the seven judges of the New York Court of Appeals *unanimously* re-entered the Appellate Division's grant of summary judgment, dismissing Immuno A.G.'s complaint. Their reasoning was stated in Judge Kaye's majority opinion for four judges and in three concurring opinions. We are confident that a review of the four opinions in the Court of Appeals (Pet. App. 1-33) will lead this Court to reject Immuno A.G.'s outlandish charges against the New York Court of Appeals. The four opinions are here highlighted:

1. The majority opinion is expressly based "on independent state constitutional grounds as well as federal review directed by the

Supreme Court." (Pet. App. 2) After summarizing the record in Part I of the opinion, the majority concluded (a) in Part II, that summary judgment is proper under *Milkovich* because Immuno A.G. had raised no triable issue of falsity (Pet. App. 4-11); and (b) in Part III, after an examination of the full publishing and political context of the Letter to the Editor and a statement of concern about the chilling effect of libel litigation on free expression, that summary judgment dismissing the libel complaint was proper "independently as a matter of state law." (Pet. App. 16-20)

2. Judge Simons concurred, agreeing that summary judgment was properly awarded on federal grounds under *Milkovich*, but concluded that "the majority has rendered an interpretation of *Milkovich* which is narrower than necessary to resolve the matter before us and one which appears, from statements in the *Milkovich* opinions, to be far more constricted than the Supreme Court intended" (Pet. App. 21). He suggested that *Milkovich* arguably "did not change the law of defamation as it was previously applied by State and lower Federal Courts." (Pet. App. 22) Opposing as a matter of his judicial philosophy a decision on dual state and federal grounds, he explained: "The Supreme Court will not review the matter because it can no longer control the litigation; its decision would constitute merely an advisory opinion." (Pet. App. 25)

3. Judge Hancock also agreed with the majority that summary judgment was properly granted on federal grounds under *Milkovich*, but agreed with Judge Simons (a) that under *Milkovich* "context continues as a factor of undiminished significance", and (b) that the Court of Appeals should not proceed further to decide the case on state grounds. (Pet. App. 32-33) Unlike Judge Simons, Judge Hancock stated there are cases "where basing a decision on both federal and state constitutional grounds may be entirely appropriate," but concluded "that this is not such a case." (Pet. App. 33)

4. Judge Titone also agreed that summary judgement dismissing the complaint was proper. However, while sharing the concerns of Judges Simons and Hancock about deciding the case as a matter of both federal and state law, Judge Titone concluded

that the case should not be decided on federal grounds, but should instead be dismissed on the sole ground of the New York common law fair comment doctrine. (Pet. App. 27-32)[6]

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[6] Immuno A.G. devotes over a page of its petition to a string citation of newspaper reports on this case (Pet. 14-15 n. 12). More to the point are its real-life effects, as described in Dr. Moor-Jankowski's letter to the editor of *The New York Times*, entitled "View from Inside a Landmark Libel Case" and published January 25, 1991:

> In your report that New York State's highest court has ruled that letters to the editor and other forms of commentary deserve protection from libel suits (news article, Jan. 16), you discuss the discrepancy in the approaches of the United States Supreme Court and the Court of Appeals to the legal standards for libel. I am the "victorious" defendant in this case and write to point out the real-life effects of this suit.
>
> I am a full-time research professor at the New York University School of Medicine and the unpaid editor of the small, international Journal of Medical Primatology. For the last seven years (10 percent of the life expectancy of the average American male) I have been sued by the multinational Austrian pharmaceutical company Immuno Aktiengesellschaft. So far, my legal expenses exceed $1 million.
>
> I underwent 14 days of depositions over a year and a half in this country and was ordered by the lower court to participate in extremely costly depositions in Austria and Sierra Leone, Africa. No wonder that I am the only remaining defendant. In the words of the Appellate Division, First Department, Immuno Aktiensgesellschaft "succeeded in coercing what the motion court referred to in its decision as 'substantial settlements' from all but one of the original defendants for the obvious reason that costs of continuing to defend the action were prohibitive." [Pet. App. 72] In one case, the insurance company settled against the protest of the author of the letter I published.
>
> This is, I believe, the first case where a commercial company sued a scientific journal for debate of an environmental issue, the use of wild chimpanzees, an endangered species, for infectious medical studies in Africa. While successive courts of appeal confirmed the letter's facts and that their discussion was protected as opinion, the seven years of proceedings consumed most of my time, curtailing my scientific activities. .

*(Footnote continued)*

## SUMMARY OF ARGUMENT

1. Immuno A.G. fails to raise a substantial federal question in its arguments attacking the conclusion of Judge Kaye's majority opinion and the concurring opinions of Judges Simons and Hancock that the Letter to the Editor is constitutionally protected under *Milkovich v. Lorain Journal Co.*, 497 U.S. ____, 110 S. Ct. 2695 (1990).

2. The issuance of a writ of certorari in this case is not proper under *Michigan v. Long*, 463 U.S. 1032 (1983), because the New York Court of Appeals expressly granted summary judgment on a bona fide separate, adequate and independent state constitutional ground. Immuno A.G.'s arguments for avoiding *Michigan v. Long* are without merit and reflect an unprecedented and unwise disrespect for state constitutions and state law in a federalist system.

## ARGUMENT

### I. IMMUNO A.G. FAILS TO RAISE A SUBSTANTIAL FEDERAL QUESTION IN ATTACKING THE CONCLUSION OF THE NEW YORK COURT OF APPEALS THAT THE LETTER TO THE EDITOR WAS CONSTITUTIONALLY PROTECTED UNDER *MILKOVICH V. LORAIN JOURNAL CO.*

#### A. *The Court of Appeals Majority Cautiously Stated And Applied Milkovich v. Lorain Journal Co.*

The majority opinion cautiously stated its understanding of *Milkovich*:

> Thus, if not alone from the Supreme Court's statement of the governing rules, then from its application of those rules

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The court victory may still not effectively protect me or other editors of small professional journals from the chilling effect of suits by wealthy corporations using our legal system to discourage criticism of their activities. We need a legal deterrent to prohibitively costly, meritless libel suits that misuse the court system to undermine our First Amendment rights.

(p. A28) Dr. Moor-Jankowski has had similar Letters ot the Editor published in *The Wall Street Journal*, p. A9 (March 1, 1991) and *The New York Law Journal*, p. 2 (Jan. 31, 1991).

> to the facts of *Milkovich*, it appears that the following balance has been struck between First Amendment protection for media defendants and protection for individual reputation: except for special situations of loose, figurative, hyperbolic language, statements that contain or imply assertions of provably false fact will likely be actionable.

(Pet. App. 7)[7]

The Court majority then applied *Milkovich*. After noting that on the original appeal, a unanimous Court of Appeals had concluded that "the factual review undertaken by the Appellate Division established that plaintiff had raised no triable issue as to the falsity of the threshold factual assertions of the McGreal letter" (Pet. App. 8), the Court majority stated: "We continue to believe that the Appellate Division review, to the extent it identified assertions of fact and concluded that such assertions had not been shown to be false, established that no triable issue of fact existed." (Pet. App. 8).

To "illustrate the enduring soundness of that analysis," the Court majority specifically applied *Milkovich* to what Immuno A.G. had on remand called the "core libel," or "core premise," or "core factual statement" of the McGreal Letter – namely, that "[r]elease of chimpanzee 'veterans' of hepatitis non-A/non-B research would be hazardous to wild populations, as there is no way to determine that an animal is definitely not a carrier of the disease". Judge Kaye's opinion on this point follows:

> Applying *Milkovich*, we discern two assertions of fact, one express and one implied. First, the statement asserts that there is no scientific method for determining if a chimpanzee

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[7] Immuno A.G. asserts (Pet.9) that the New York Court of Appeals heard the second oral argument "apparently believing that *Milkovich* was just saying, 'look, don't apply this *Gertz* dictum with a heavy hand. Just don't apply it willy-nilly, but analyze each case.'" The petition then refers to "A 98 (Hancock, J.)," which discloses that Judge Hancock was *questioning* Immuno A.G.'s counsel about the meaning of *Milkovich*, not stating what his six colleagues "believed" *Milkovich* was "saying". In fact, the differences between the discussions of *Milkovich* in Judge Hancock's concurring opinion and the majority opinion show that his question did *not* reflect what at least four of his colleagues believed.

exposed to the non-A/non-B virus is not a carrier of the disease. Second, the statement implies that plaintiff will release possible carrier-chimpanzees who may endanger the wild population . . . .

As for the express assertion of the absence of a test, plaintiff has pointed us to no proof establishing a scientific test in the relevant period that could conclusively determine the carrier state in chimpanzees or, more specifically, could definitely rule out that a veteran chimpanzee was not a carrier of the virus. When considered against the extensive record, plaintiff's effort to establish that there was a fail-proof test, by weaving together isolated fragments of the testimony of various experts (including defendant), simply does not satisfy its legal burden.

To the contrary, what is apparent from the record is that in the relevant period there was an ongoing process of discovery and debate centering on the very existence of a carrier state of the virus, all of which was made even more inconclusive by ambiguity as to precisely when relevant technology was acquired. When asked if it was possible that the test for detecting the carrier state would yield negative results even though the chimpanzee carried the virus, plaintiff's Dr. Johann Eibl replied "[t]here is no proof on that." Finally, even if the express assertion of the "core premise" had been shown to be false, that assertion would not itself libel plaintiff, because it does not "stat[e] actual facts' about [that] individual." (*Milkovich v. Lorain Journal Co.*, 497 U.S. at ____, 110 S.Ct. at 2706, supra; *see also King Prods. v. Douglas*, 742 F.Supp. 778, 784 [SDNY]).

Similarly, as the Appellate Division concluded, there was no proof of falsity of the implied assertion of fact — that plaintiff in the relevant period planned to release chimpanzees with no means of definitely determining that they were not carriers of the disease, thus endangering the wild populations. It is clear from the record that plaintiff, in 1983, was considering the option of rehabilitating chimpanzees used at the projected Sierra Leone facility, for return to a

> natural state (*see*, 145 A.D.2d, at 136). With no proof of the falsity of the express assertion that there was a conclusive test of carrier status available in 1983, it follows that there was also no proof of the falsity of the implied assertion that plaintiff planned to return its veteran test animals with no means of definitely determining that they were not hepatitis carriers.

(Pet. App. 8-10) The Court also considered "[a]s an additional matter," the Appellate Division's findings concerning the lack of any practical test for determining infectiousness (as opposed to the carrier status). (Pet. App. 10)

### B. *Immuno A.G. Does Not Raise A Federal Question Concerning The Reading By The New York State Appellate Courts Of The Letter To The Editor.*

To avoid the conclusion that summary judgment is proper under *Milkovich*, Immuno A.G. does not quote the Letter to the Editor from which any "implications" are to be derived, but complains that the Court of Appeals, because it did not find false defamatory implications, "misconstrued and trivialized" *Milkovich*. (Pet. App. 17-18) This complaint does not raise a substantial federal question.

What implications of fact may be drawn from an express statement, and whether any such implications are defamatory, are initially issues of *state* law. (*See* p. 25, *infra*.) In New York, there is a developed body of libel law on (a) whether a statement may be implied from a publication, *Cohn v. NBC*, 50 N.Y.2d 855, 887, 408 N.E.2d 672, 673, 430 N.Y.S.2d 265 (published language must be given a fair reading and courts not to strain to find untenable defamatory interpretations), *cert. denied*, 449 U.S. 1022 (1980); and (b) if it may, whether such statement may be found defamatory, *Aronson v. Wiersma*, 65 N.Y.2d 592, 593-94, 483 N.E.2d 1138, 1139, 493 N.Y.S.2d 1006, 1007 (1985) (issue of law for the Court to determine whether there is a reasonable basis for drawing a defamatory meaning from a statement).

The *federal* constitutional issue is whether implications permissible under the states' libel laws are in conflict with the First Amendment. *Milkovich* ruled that, as a matter of federal constitutional

law, Ohio (a) "could conclude" that the complained of article contained an implied defamatory accusation of perjury, and (b) if it did, could subject the implied defamatory statement to Ohio libel law. *Milkovich* did not require Ohio, as a matter of federal constitutional law (or as a matter of Ohio libel law), to find an implied charge of perjury. Put somewhat differently, the First Amendment does not *require* the states to find implications that, as a matter of state law, are not present.

It therefore follows that in this case, nothing in *Milkovich requires* New York to find any implication in the Letter to the Editor that the Court of Appeals did not determine was present.[8]

### C. *Immuno A.G. Does Not Raise A Federal Question Concerning The Correct Determination Of The New York State Appellate Courts That There Is No Triable Issue Of Falsity.*

Also to avoid the conclusion that summary judgment is proper under *Milkovich*, Immuno A.G. complains that the New York Appellate Division and Court of Appeals erred in concluding that there is "no triable issue of falsity" (the summary judgment standard under the New York CPLR 3212). Again, however, Immuno A.G. fails to raise a "substantial federal question." Falsity is an element of the state law cause of action for libel, and it is with regard to that element Immuno A.G.'s proof failed on summary judgment under the New York CPLR 3212. Accordingly, Immuno A.G.'s request for this Court to review the record on proof of falsity is wholly without merit for three reasons.

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[8] Immuno A.G. cites Judge Simons, responding to footnote 3 in the majority opinion, that if there were a defamatory implication from the Letter to the Editor under *Milkovich*, the Court majority should identify it. (Pet. App. 17-18) Immuno A.G. ignores that the Court majority and Judge Simons both agreed that summary judgment was proper under *Milkovich* and that Immuno A.G.'s argument on remand failed to show to either the Court majority or to Judge Simons that there were any such false defamatory implications.

1. This Is An Appropriate Case For This Court To Defer To The State Court Review of the Record.

The customary rule for this Court is to defer to state court determinations of fact based on the state court's examination of the record. *See, e.g., Pennekamp v. Florida*, 325 U.S 331, 345 (1946) ("we are accustomed to adopt the result of the state court's examination"); *Time, Inc. v. Firestone*, 424 U.S. 448, 463 (1976) (Rehnquist, J.) ("Even where a question of fact may have constitutional significance, we normally accord findings of state courts deference . . ."). Not applicable here is the review required by *New York Times v. Sullivan*, 376 U.S. 254, 285 (1964), and *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984), because those precedents establish that "in cases raising First Amendment issues, an appellate court has an obligation to 'make an independent examination of the whole record' *in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression'* " (emphasis supplied). Here, the New York Court of Appeals decision, upholding summary judgment dismissing the libel complaint, does not present any risk of a judgment constituting a forbidden intrusion on the field of free expression. In fact, Immuno A.G. seeks to turn *New York Times v. Sullivan* on its head and have this Court (a) independently examine the record *de novo* to review the determinations of the New York State appellate courts (which themselves made an independent examination of the whole record), and (b) reverse the state court appellate courts' judgment that the corporate plaintiff does not have a *state* common law cause of action. There is no federal interest in this case justifying this Court to engage in such review.

2. The Ordinary Rules Of Summary Judgment In New York Were Applied.

This case involves the application of the ordinary rules of summary judgment in New York, which provide that a party opposing a properly made summary judgment motion cannot rest on the conclusory allegations of the complaint, but must come forward with competent proof creating "triable issues of

fact." *Zuckerman v. City of New York*, 49 N.Y.2d 557, 560, 404 N.E.2d 718, 720, 427 N.Y.S.2d 595, 598 (1980); *Alvord & Swift v. Steward M. Muller Constr. Co.*, 46 N.Y.2d 276, 281-82, 385 N.E.2d 1238, 1240-41, 413 N.Y.S.2d 309, 311-12 (1978). Similarly, federal law imposes the burden on a party opposing a properly made summary judgment motion to come forward with competent evidence, and not rest on conclusory statements, with respect to an issue as to which the party bears the burden of proof (as Immuno A.G. does here on falsity). *Celetex Corp. v. Catrett*, 477 U.S. 317 (1986); *Fontenot v. Upjohn*, 780 F.2d 1190, 1195-96 (5th Cir. 1986). Summary judgment was properly granted in this case because, as determined by the New York State appellate courts, Immuno A.G. simply did not have proof creating "triable issues" under the New York CPLR 3212 – or what presumably would be discussed as "genuine issues of material fact" under federal law. To use the Appellate Division's words, Immuno A.G.'s case was "ill-focused" (Pet. App. 87). Consequently, contrary to Immuno A.G.'s argument (Pet. 20-21), the granting of summary judgment here is consistent with *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986), where this Court *reversed* the denial of summary judgment in a libel case, stating:

> . . . the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is there be no genuine issue of material fact.
>
> As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.

477 U.S. at 247-248.

3. The New York Appellate Courts Correctly Treated The Record.

If this Court were to depart from its customary practice of deferring to state court determinations of fact in the absence of

federal constitutional interest and instead duplicate the work of the New York appellate courts, this Court would see for itself that Immuno A.G.'s arguments have been thoroughly dealt with and properly rejected by the New York appellate courts.

(a) The "Core Premise".

Contrary to Immuno A.G.'s argument (Pet. 21), the New York appellate courts, in upholding summary judgment dismissing the complaint, determined that a reasonable factfinder could not find falsity with respect to the statement that "[r]elease of chimpanzee veterans of hepatitis non-A non-B research would be hazardous to wild populations, *as there is no way to determine that an animal is definitely not a carrier of the disease*." (Pet. App. 151; emphasis supplied)

The Appellate Division stated:

> It is quite clear that Dr. McGreal was correct in her observation that there is no way of definitely determining whether an animal is a non-A/non-B carrier. Dr. Alfred Prince, the discoverer of non-A/non-B hepatitis and widely regarded as the preeminent authority on that form of hepatitis, . . . expressly confirmed that, as Dr. McGreal had stated, there is no test to identify the viral agent which causes non-A/non-B hepatitis, and indeed Immuno's own Dr. Eder co-authored an article acknowledging that the virus lacks generally accepted serological and morphological markers (4 Hepatology Magazine 510 [1984]). There is then no real issue as to the accuracy of the factual premise underlying McGreal's concern that undetected non-A/non-B carriers might be released.

(Pet. App. 84) Indeed, Immuno A.G.'s counsel, referring to the McGreal statement "there is no way to determine that an animal is definitely not a carrier of the disease", admitted in his last oral argument to the Court of Appeals: "That is not a misstatement of fact. There is no way to determine if an animal is a carrier." (Pet. App. 97)

Having conceded there is no test of the carrier state, Immuno A.G. argues in its petition that there is nevertheless a procedure

for determining "infectiousness" (Pet 6). That argument, however, had been rejected by the New York Appellate Division (Pet. App. 84-85) and was rejected again on remand by the New York Court of Appeals:

> As an additional matter, the Appellate Division considered infectiousness as well as carrier status (the "core premise" refers only to carriers [see, 145 AD2d, at 139]). Although there was testimony that infectiousness might be tested by inoculating a healthy chimpanzee with the blood of a potentially infected animal to see whether the healthy animal developed hepatitis symptoms, plaintiff produced no proof that it would in fact be implementing that procedure at its facility. That procedure was described by Dr. Alfred Prince, a leading expert, as "expensive," "laborious" and "wasteful," in that it involved the deliberate infection of healthy chimpanzees to test the infectiousness of animals that had been exposed to the virus. As the Appellate Division noted, "McGreal can hardly be faulted for not assuming that Immuno would necessarily perform the inoculation procedure on every one of the many chimps it intended to return to the wild." (145 AD2d, at 140)

(Pet. App. 10)

Now, in this Court, Immuno A.G. again claims that Dr. Moor-Jankowski knew "how to tell that chimpanzees exposed to hepatitis non-A/non-B were infectious" (Pet. 5, 16, 21), and that his "sworn testimony . . . proved the falsity of the libel." (Pet. 16) Dr. Moor-Jankowski's testimony, however, did no such thing. The testimony of Dr. Moor-Jankowski establishes: (1) that it was *not* possible to determine that a chimpanzee exposed to hepatitis non-A/non-B definitely is *not* a carrier—which is the statement made in the McGreal Letter—but it was possible, based on the test history of laboratory animals, to presume that a chimpanzee exposed to hepatitis non-A/non-B *is* a carrier (Resp. App. 14); and (2) that an inoculation procedure could be used to identify infectiousness. A presumption that a chimpanzee is a carrier does not contradict the statement "there is no way to determine definitely that an animal is not a carrier of the disease." An inoculation procedure, which

involves the injection of a healthy chimpanzee with the serum of a chimpanzee exposed to hepatits non-A/non-B, is not a test "to identify the viral agent which causes non-A/non-B hepatitis" (Pet. App. 84) and is neither "fool-proof" (Pet. App. 9) nor practical for the purpose of screening the possible annual release of 60 to 80 chimpanzee veterans of hepatitis non-A/non-B research. (*See* Pet. App. 10, 84-85, 106-108; Resp. App. 11)

(b) Events Prior To Publication.

Immuno A.G. also misstates events that occurred before Dr. Moor-Jankowski published the McGreal Letter to the Editor. For example:

*First*, Immuno A.G. repeats its argument that Dr. Moor-Jankowski deliberately incited Dr. McGreal to write the Letter to the Editor (Pet. 15), even though the Court of Appeals rejected that contention *three* times (Pet. App. 43, 90, 4). The record, summarized by the New York Appellate Division and Court of Appeals, makes clear that the Letter was "provoked by a particular state of affairs" (Pet. App. 42); and that state of affairs included (a) the CITES treaty, which restricts the transnational movement of endangered species such as chimpanzees and was ratified by Austria in April 1982, and (b) the August 23, 1982 document by Klaus Bieber, Immuno A.G.'s representative in Sierra Leone, which describes the Immuno A.G. proposal for a Sierra Leone research facility using captured chimpanzees. (Pet. App. 74-75) The Letter to the Editor criticizes the proposal reflected in the Bieber document, and one of the Letter's criticisms is that the proposal is a way of "getting round [CITES] restrictions on the international movement of chimpanzees" (*see* p. 3, *supra*).

*Second*, Immuno A.G. complains that Dr. Moor-Jankowski allowed the Letter's comment that "readers familiar with the destructive method by which chimpanzees are caught (killing of mothers in most cases) may be surprised" by the August 23, 1982 Bieber statement that Immuno A.G.'s proposal would not adversely impact the numbers of wild champanzees. *(See* p. 4, *supra.)* On this point, the Appellate Division dispositively determined that "It has not been seriously disputed in the course of this litigation

that, as Dr. McGreal stated, chimpanzees are most often caught by killing their mothers, and it has been estimated that for every juvenile chimps captured, 5 to 10 mothers are killed." (Pet. App. 83)[9]

*Third*, Immuno A.G. ignores the facts concerning the opportunity to reply to the Letter, which Dr. Moor-Jankowski twice afforded the company and which the Appellate Division observed, "was made extraordinarily available to [the company]." (Pet. App. 82) The significance of this omission is evident in light of the Appellate Division's discussion of these facts (the "first remedy" under *Gertz v. Robert Welch, Inc.*) (Pet. App. 82-3); and Judge Kaye's references to those reply opportunities in her opinion for a unanimous Court of Appeals ("rebuttal openly invited") (Pet. App. 43); and, on remand, for the majority of the Court ("rebuttal openly invited") (Pet. App. 19).

*Fourth*, Immuno A.G. incorrectly asserts that Dr. Moor-Jankowski "deliberately ignored conflicting evidence" that Immuno A.G. agreed not to try to release "used" chimpanzees back to the wild and to establish a breeding facility. (Pet. 6) The Appellate Division rejected this assertion (Pet. App. 80). Dr. Moor-Jankowski did review the documents in question, but concluded that they confirmed the situation described in the McGreal Letter to the Editor (Resp. App. 15-17)[10] and that Immuno A.G. could not

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[9] Immuno A.G. has asserted, based on pre-1982 correspondence, that Dr. Moor-Jankowski knew that Immuno A.G.'s source of chimpanzees, Franz Sitter, obtained chimpanzees without employing destructive methods (Pet. 5). Not only is the assertion irrelevant, but also the record shows that prior to the publication of the Letter, Dr. Moor-Jankowski had come to the conclusion that Sitter was using destructive means to capture chimpanzees. (Resp. App. 12-13)

[10] For example, Dr. Abass Bundu, the Sierra Leone Minister of Agriculture, reported in a memorandum that "the main reason why" Immuno A.G. was proposing the facility was that the company "would not otherwise be able to import chimpanzees into Austria by virtue of the Washington Agreement [the CITES Treaty] . . . to which Sierra Leone and Austria are both signatories." (Pet. App. 76, 164-165) Also, the Bundu memorandum stated that Immuno A.G.'s proposal to rehabilitate the chimpanzees after testing and to return them back to the wild was not sound for reasons similar to those stated in the McGreal Letter, including "a risk of transmission of viruses acquired during the experimentation" (Pet. App. 76, 166).

proceed with the suggested captive breeding, as to which *Die Presse* had already quoted Immuno A.G.'s director Dr. Eibl as presenting "unsurmountable difficulties". (Pet. App. 80-81; Resp. App. 15-17)[11]

## II. CERTIORARI IS NOT PROPER UNDER *MICHIGAN v. LONG.*

### A. *This Case Involves A Clear Application Of Michigan v. Long.*

In *Michigan v. Long*, *supra*, 463 U.S. at 1040-41, this Court stated the standard for considering whether to issue a writ of certiorari that is applicable in this case:

> Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground . . . . If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance and do not themselves compel the result that the court has reached . . . . If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.

With this direction, Judge Kaye's opinion for the New York Court of Appeals majority carefully complied in a number of ways: (1) Judge Kaye expressly states at four points that the Court majority is deciding the case on *independent* state constitutional grounds (Pet. App. 2, 11, 13-14, 16); (2) Judge Kaye discusses the

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[11] Indeed, Immuno A.G.'s argument about "conflicting evidence" is not consistent with its own admissions: the only decision made by Dr. Eibl of Immuno A.G. following the meeting between Immuno A.G.'s employee, Dr. Eder, and Sierra Leone government officials in April 1983, was to apply for permits for an importation of chimpanzees from Sierra Leone to Austria, *not* to proceed with breeding (Resp. App. 18), and Dr. Eibl's testimony makes it clear that taking chimpanzees from the wild for use in research and releasing "used" chimpanzees back to the wild continued to be part of Immuno A.G.'s desired plan (Resp. App. 19-20).

state constitutional values at stake and concludes that the state constitutional decision is in accordance with state constitutional core values (Pet. App. 11-12); (3) Judge Kaye expressly states that the reference to federal cases in the state law analysis is for "the purpose of guidance only" and does not compel the result (Pet. App. 13); (4) Judge Kaye expressly discusses the reasons for a separate and independent state law analysis: (a) New York's "own exceptional history and rich tradition" in its State Constitution and common law concerning the liberty of the press, (b) the responsibility of the Court of Appeals to settle the law of New York, particularly since (in the majority's view) under *Milkovich*, insufficient protection may be accorded to core values protected by the New York Constitution, and (c) the pointlessness of deferring state law review (Pet. App. 14); and (5) Judge Kaye provides a separate state law analysis (Pet. App. 16-20). It follows that under *Michigan v. Long* certiorari is not proper in this case.

### B. *Immuno A.G.'s Arguments To Avoid Application Of Michigan v. Long Are Meritless.*

In an attempt to avoid the clear application of *Michigan v. Long*, Immuno A.G. makes six arguments. Not one has merit.

1. Immuno A.G. falsely asserts that the Court of Appeals majority has "disguised" a federal constitutional determination as a matter of state constitutional law. (Pet. 12) When the Court of Appeals originally decided the case, it held that the Letter to the Editor was privileged opinion under both the Federal *and State* Constitutions (Pet. App. 38, 43) and treated the opinion privilege as the successor to the state common law fair comment doctrine (Pet. App. 38-39, 43). On remand, for "further consideration in light of *Milkovich*," the majority not only upheld summary judgment under *Milkovich* (because there was no triable issue of falsity), but also independently adhered to its original state constitutional decision on the basis of New York State constitutional concerns and values:

> It has long been recognized that matters of free expression in books, movies, and the arts generally, are particularly suited to resolution as a matter of State common law and

> State constitutional law, the Supreme Court under the Federal Constitution fixing only the minimum standards applicable throughout the Nation, and the State courts supplementing those standards to meet local needs and expectations . . . .
>
> [New York] State, a cultural center for the Nation, has long provided a hospitable climate for the free exchange of ideas . . . . That tradition is embodied in the free speech guarantee of the New York State Constitution, beginning with the ringing declaration that "[e]very citizen may freely speak, write and publish . . . sentiments on all subjects." (N.Y. Const., art 1, § 8). . . .
>
> Thus, . . . the "protection afforded by the guarantees of free press and speech in the New York Constitution is often broader than the minimum required by" the Federal Constitution. . . .

(Pet. App. 11-12) The Court of Appeals accordingly affirmed its original state constitutional decision because it was in accordance with core values protected by the State Constitution (Pet. App. 12-13, 16-20). Indeed, the majority opinion could be described as stating New York's current state constitutional fair comment doctrine.[12]

2. Immuno A.G. mistakenly asserts, without citation of any authority, that the New York Court of Appeals "exceeded" the scope of the remand in deciding the case on independent state constitutional grounds (Pet. i, 9). What the remand order required was "further consideration in light of *Milkovich*"; it did not dictate how *Milkovich* was to be considered. The majority complied by considering *Milkovich* at length and concluding (a) that summary judgment was mandated under the mode of analysis indicated

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[12] The reliance by the Court of Appeals on the state constitutional free speech guaranty in this context is not novel. To the contrary, a leading state common law fair comment case, *Coleman v. MacLennan*, 78 Kan. 711, 98 P. 281 (1908), contained an extensive discussion of the Kansas State Constitution's free speech guaranty, as well as a consideration of the adverse effects of libel litigation on free expression.

in *Milkovich*, and (b) that summary judgment was separately and independently mandated under its original state constitutional analysis and decision. The majority thus acted consistently with the terms of the remand order. *People v. Duncan*, 124 Ill.2d 400, 530 N.E.2d 423 (1988); *Arcara v. Cloud Books, Inc.*, 68 N.Y.2d 553, 503 N.E.2d 492, 510 N.Y.S.2d 844 (1986); Hellman, "Granted, Vacated and Remanded - Shedding Light On A Dark Corner Of Supreme Court Practice," 67 Judicature 389 (1984).

3. Immuno A.G. is also mistaken in asserting that ever since *New York Times v. Sullivan*, 376 U.S. 254 (1964), "the U.S. Supreme Court has set *national* policy in the development of defamation law." (Pet. 12; emphasis in the original) There is no general federal law of libel. *See Erie Railroad Co. v. Tompkins*, 340 U.S. 64 (1938) (Brandeis, J.). The legal remedy for protection of reputation is entrusted to the states, *see Paul v. Davis*, 424 U.S. 693 (1976) (Rehnquist, J.); defamation has always been, and continues to be, a *state* law cause of action, in existence because of state legislative reception of such common law (*see* James Madison, "The Virginia Report of 1799-1800," *reprinted in The Mind of the Founder*, M. Meyers ed., pp. 245-46 (rev. ed. 1981)), and subject, as is all state law, to state constitutional law. What this Court has done ever since *New York Times v. Sullivan* is to articulate constitutional limits on the states' libel laws, not to dictate the development of the states' libel laws within those limits. *See, e.g., Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (states to set standard of liability for public concern/private figure cases so long as not strict liability). Furthermore, these federal constitutional restrictions on the states' libel laws do not foreclose the state courts from applying additional state constitutional (and common law) restrictions on their own state law cause of action to safeguard freedom of expression. *See Arcara v. Cloud Books, Inc.*, 68 N.Y.2d 553, 557-558, 503 N.E.2d 492, 494, 510 N.Y.S.2d 844, 846 (1986). *See* Note, "Developments In The Law - The Interpretation of State Constitutional Rights," 95 Harv.L.Rev. 1324 (1982).

4. Immuno A.G. also wrongly claims that the Court of Appeals "misused" *Michigan v. Long* "to ward off" U.S. Supreme Court review, thereby risking the subordination of federal interests to

state interests. (Pet. 13) As defamation is a state law cause of action, Immuno A.G. cannot sensibly complain about an independent state determination in the absence of a defined federal interest and also ignore the state court's extensive discussion of state law interests protecting free expression. (Pet. App. 11-14)[13]

5. Immuno A.G. further argues that "the next step after *Michigan v. Long* ought to be a holding that this Court has jurisdiction to review state court decisions which are *prima facie* grounded on state law, but which are to a certain degree interwoven with or derived from federal jurisprudence." (Pet. 13) This proposal, however, is in substance *not* one to extend or even to modify *Michigan v. Long*; it is a proposal to overrule *Michigan v. Long*. It would call upon this Court to disregard the bona fide express statement of the Court of Appeals made in response to *Michigan v. Long* – that the decision is based on independent state constitutional grounds and the citation of federal precedent is for guidance only and does not compel the result.

6. Immuno A.G. also erroneously claims that the "independent state ground" articulated in Part III of the majority opinion is "a pure invention" because it is founded on this Court's decision in *Philadelphia Newspapers v. Hepps*, 475 U.S. 767 (1986). (Pet. 16-17) Nowhere is *Hepps* cited or applied in Part III of the majority opinion, which discusses the majority's separate, adequate and independent state constitutional ground of decision. In fact, the only place where *Hepps* is cited in the majority opinion is in Part II containing its federal law discussion, at which point the Court of Appeals majority also cites its own New York precedent for the libel plaintiff's burden of proving falsity, *Silsdorf v. Levine*, 59 N.Y.2d 8, 449 N.E.2d 716, 462 N.Y.S.2d 822, *cert. denied*, 464 U.S.

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[13] Instead, Immuno A.G. charges the New York Court of Appeals with "glibly saying that Immuno should not consider 'any trip to Washington'". (Pet. 15) What the Court of Appeals majority stated was "In view of the costly, sizable record already amassed, including hundreds of pages of briefs, no purpose is served by compelling *these* parties, on *this* record and *these* briefs, to consider another trip to Washington, with the prospect that State law review before this Court would ultimately be available" (Pet. App. 14; emphasis in the original and footnote omitted).

831 (1983), and *Steinhilber v. Alphonse*, 68 N.Y.2d 283, 501 N.E.2d 550, 508 N.Y.S.2d 901 (1986) (*see* Pet. App. 8). Furthermore, even if the libel plaintiff's burden of proving falsity under state law had in theory originated in *Hepps*, the Court of Appeals majority expressly states that in the "state law analysis reference to Federal cases is for the purpose of guidance only, not because it compels the result" (Pet. App. 13).

### C. *Immuno A.G.'s Argument That Certiorari Should Be Issued To Stop A "Judicial Stampede" Away From Milkovich Is In Substance An Unprecedented And Unwise Attack On State Constitutions And State Law In A Federalist System.*

Immuno A.G. further argues that this Court should grant certiorari in order to prevent "a judicial stampede" away from *Milkovich*, which petitioner says will result from the decision of the Court of Appeals in this case. (Pet. 18-22) Immuno A.G. may well be presuming an understanding of *Milkovich* that this Court did not intend, but in any event, Immuno A.G. is asking this Court to disallow, in an unprecedented and unwise manner, the separate and independent application of a state's constitution and a state's laws.

1. Immuno A.G. first criticizes the reasoning of the New York Court of Appeals under the New York Constitution:

> The Court of Appeals majority ignored the teaching of *Milkovich* as to the role of context. It held that one reason the *state* constitution protected the libel letter was *context*.

(Pet. 18; emphasis in the original) Thus, Immuno A.G. is apparently claiming that in the absence of any defined federal right, this Court can tell the New York Court of Appeals how to interpret the New York State Constitution (and also to disregard to the consideration of a publication's context required under New York common law). This Court, however, does not review state court interpretations of state law in such situations. *See, e.g., Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975); *Scripto, Inc. v. Carson*,

362 U.S. 207, 210 (1960); *Winters v. New York*, 333 U.S. 507, 514 (1948); *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1875).

2. Immuno A.G. follows its complaint about independant state constitutional decision-making with a *non sequitur* designed to disallow appropriate state appellate law review (even though petitioner is suing on a state common law claim):

> This Court should grant *certiorari* once more in this case, announce its jurisdiction to review independent state grounds to the extent interwoven with federal law, and send this case directly to the trial judge for a trial.

(Pet. App. 19-20) Obviously, "independent state grounds" are by definition *not* "interwoven with federal law" and under *Michigan v. Long not* appropriate for review. Furthermore, this Court's practice has been, consistent with due respect given to state courts in a federalist system, to remand the case to the state appellate court whose decision is under review for proceedings not inconsistent with this Court's opinion. *See e.g., New York Times v. Sullivan*, *supra*, 376 U.S. at 292; *Milkovich*, *supra*, 110 S. Ct. at 2708. This practice is especially appropriate here, where a state's highest court has already held that a state law action should be dismissed under the state's provisions for summary judgment on independent state constitutional law grounds and that such state grounds are separate and independent of federal law (Pet. App. 11-16).[14]

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[14] In addition, the state appellate process should not be bypassed (a) because as shown in Judge Titone's concurring opinion, the Letter is privileged under the New York common law doctrine of fair comment and the Court of Appeals should be free to determine this matter, and (b) because, as shown in Part III of Dr. Moor-Jankowski's brief on remand to the New York Court of Appeals, there are alternative grounds for dismissing this case which have not been necessary to reach but which are also dispositive: (i) there was no defamation as a matter of state law; (ii) there was no "actual malice" as a matter of federal law or "gross irresponsibility" as a matter of state law – the opportunity given to Immuno A.G. to reply to the Letter and the existence of confirming documents and press articles would seem to render absurd Immuno A.G.'s argument about culpable falsity; and (iii) there were no actual pecuniary damages, which a corporate plaintiff must have in order to proceed with a libel cause of action in New York and elsewhere, *see* Second Restatement of Torts § 561, and must establish in order to satisfy *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

3. Immuno A.G. finally asserts that certiorari should be granted in this case in order to provide guidance as to the treatment of the burden of proof of falsity under *Hepps* in the context of a summary judgment motion. (Pet. 20-22) The request is misconceived because guidance already exists (*see* p. 17, *supra*) and the Court of Appeals majority has made it clear that federal cases such as *Hepps* are not controlling (Pet. App. 13). Given the precedents of the Court of Appeals on point, *see* pp. 26-27, *supra*, the libel plaintiff's burden of proving falsity in New York must be considered independent of *Hepps*.

## CONCLUSION

Immuno A.G.'s petition is without merit because (1) it does not present a federal question requiring this Court's attention, and (2) the case has been decided on bona fide separate, adequate and independent state constitutional grounds. In this 200th year of the First Amendment (written by James Madison) and this 170th year of the current New York Constitution's free speech guaranty (inspired by Alexander Hamilton), it is time for this case to end.

Dated: May 10, 1991

Respectfully submitted,

PHILIP A. BYLER
*Counsel of Record and Attorney for Respondent Dr. Moor-Jankowski*

*Of Counsel:*

LOUIS LAUER

STULTS BALBER HORTON & SLOTNIK
1370 Avenue of the Americas
New York, New York 10019
(212) 246-2400

# APPENDIX

A. *Constitutional And Statutory Provisions.*

Article III, section 2, clause 1 of the United States Constitution provides in pertinent part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority, . . . to Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No state shall . . . deprive any person of life, liberty or property, without due process of law.

Title 28 of the United States Code, section 1257(a) provides:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question ont he ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Article I, Section 8 of the New York State Constitution provides in pertinent part:

> Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of

> that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press . . .

Section 3212 of the New York Civil Practice Law and Rules ("CPLR") provides in pertinent part:

> A motion for summary judgment . . . shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the Court as a matter of law in directing judgment in favor of any party.

B. *Dr. Jan Moor-Jankowski's Curriculum Vitae (A 4035-37).*

## CURRICULUM VITAE

JAN MOOR-JANKOWSKI

| | |
|---|---|
| **Born:** | 5th February, 1924, Poland<br>U.S.A. Citizen, naturalized 1963<br>WWII Polish Home Army (Underground): disabled war veteran |
| **Education:** | |
| 1945 | Matriculated at Fribourg University Medical School, Switzerland |
| 1954 | M.D. Berne University Medical School, Switzerland |
| **Honors:** | |
| 1956 | Geneva University Prize "Prix Arthur de Člaparde" for research work on demography and population genetics of Swiss mountain populations. |
| 1971 | Trumpeldor medal, Prime Minister's Office, Life Sciences Division, Israel for consultations on developing new research programs. |
| 1978 | Medal, USSR Academy of Medical Sciences, Institute of Experimental Pathology and Therapy, for consultations on medical use of primate animals. |
| 1979 | G. Bude medal, College de France, Paris. |
| 1984 | Knight of the French Order "Ordre National du Merite" awarded by the French President for resistance activity in WWII and for scientific achievements. |

**Major Research Interest:**

Experimental medicine; immunology; use of primate animals in research; Conservation.

**Research and Professional Experience:**

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|---|---|
| 1979-present | Research Collaborator in the Medical Department, Brookhaven National Laboratory, Associated Universities, Inc., Upton, New York 11973. |
| 1980 | Lecturer, WHO International Course (2 weeks) on the Utilization of Non-Human Primates in Cancer Research, Sukhumi, U.S.S.R. |
| 1979 | Professeur invite, College de France, Paris |
| 1975-present | Director, WHO Collaborating Centre for Haematology of Primate Animals at the Laboratory for Experimental Medicine and Surgery in Primates (LEMSIP), New York. |
| 1965-present | Director, Laboratory for Experimental Medicine and Surgery in Primates (LEMSIP), of New York University Medical Center - 50 employees including 5 full-time and 2 part-time faculty members; average 120 collaborating or visiting scientists per year; average annual operating budget $2.5 million. |
| 1965-present | Research Associate Professor, then Professor (since 1969). Department of Forensic Medicine, New York School of Medicine. |
| 1965-1970 | Director, LEMSIP division, On-Site at Holloman Air Force Base, New Mexico. |

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|---|---|
| 1959-1975 | Associate, Seminar on Genetics and Evolution of Man, Columbia University, New York. |
| 1964-1965 | Chief, Division of Experimental Immunogenetics and Oncology, Yerkes Regional Primate Research Center of Emory University, Atlanta, Georgia. |
| 1962-1964 | Visiting Scientist, Human Genetics Branch, NIDR, NIH, Bethesda, Maryland. |
| 1959-1962 | Special Research Fellow of the United States Public Health Service, National Heart and Lung Institute: At Blood Group Research Unit, Lister Institute, London, and at the Department of Pathology, University of Cambridge, England. |
| 1953-1957 | Research Associate at the Institute de Genetique Humaine, Medical School of the University, Geneva, Switzerland. |
| 1952-1953 | Fellow of the De Giacomi Foundation, Swiss Society of Natural Sciences. |

**Membership in Professional Societies:**

The American Society for Advancement of Science
The American Society of Human Genetics*
The American Association of Immunologists*
American Tissue Culture Society (charter member)
Society for Cryobiology (charter member)
New York State Society for Medical Research
(1965-1973, Director 1970-1973)
The Society for Immunology (British)*
The Swiss Genetic Society
The Swiss Society for Natural Sciences

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* Only candidates with considerable scientific achievement are accepted for membership by the Admission Committee.

The International Primatological Society
The Transplantation Society (charter member)*
International Society for Biological Standardization
Physicians' Scientific Society (limited to 100 members who vote on new admissions)

**Publications:**

Author of a monograph in human genetics and of more than 200 papers in the fields of human genetics, immunology, medical experimentation in primate animals, and research administration.

| | |
|---|---|
| 1967-1978 | Editor, Series "Primates in Medicine", Karger, Basel/New York (10 volumes) |
| 1967-1972 | Editor, Proceedings of Conferences on "Experimental Medicine and Surgery in Primates" (Three Conferences, 5 volumes, 3,000 pages). |
| 1968-1973 | Advisory Board of "Experimentation animale", Vigor Freres, Paris. |
| 1971-present | Editor-in-Chief, "Journal of Medical Primatology", Karger, Basel/New York. Since 1982 published by Alan R. Liss, Inc., New York. |
| 1983-present | Editorial Board Member "Monographs in Primatology", Alan R. Liss, Inc., New York |
| 1984-present | Special Advisor to the Editor, "American Journal of Primatology", Alan R. Liss, Inc., New York. |

**Consultancies:**

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|---|---|
| 1963-1970 | USAF Holloman Air Force Base, White Sands Proving Grounds, New Mexico. |

*Only candidates with considerable scientific achievement are accepted for membership by the Admission Committee.

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|---|---|
| 1966-1967 | Deutsche Forschumgsgemeinschaft (German Science Foundation) and Volkswagenwerk Stiftung (Volkswagen Foundation) - plans for the German Primate Center. |
| 1967 | Bundesgesundheitsministerium (Department of Health, German Federal Republic) and Robert Koch Institute, Berlin, on containment of Marburg virus in monkey colonies. |
| 1969-1974 | INSERM (National Institute for Medical Research) and CNRS (National Center for Scientific Research) France. |
| 1969-1979 | Chief Medical Examiner, New York City. |
| 1970-1974 | National Council for Research and Development, Life Sciences Division, Prime Minister's Office, Israel. |
| 1977-1980 | U.S.S.R. Academy of Medical Sciences, Institute of Experimental Pathology and Therapy, Sukhumi, U.S.S.R. |
| 1978 & 1985 | Member, NIH Task Force on the Use of and Need for Chimpanzees in Medical Research. |
| 1979 | French and Gabon (Africa) authorities, for the Gabon Primate Center. |
| 1978-1979 | Pierre Micaux Parliamentary Committee, (France) on Animal Experimentation. |
| 1986-present | Pan American Health Organization, for Peruvian Primate Project Iquitos, Peru. |

C. *Excerpts of Testimony on Dr. Shirley McGreal.*

Dr. Jane Goodall, internationally renowned for her research on chimpanzees in the wild (A3938):

> In her capacity as Chairwoman of IPPL, Shirley McGreal has, in my opinion, acted in a responsible and often highly courageous way in pursuit of the goals of IPPL - the conservation of non-human primates in the natural habitat and the humane treatment of non-human primates in captivity throughout the world . . .

Dr. Vernon Reynolds, Oxford University Lecturer in Physical Anthropology and prominent scientist (A3987, A3989-90):

> Dr. Shirley McGreal edits the IPPL Newsletter and contributes articles toward it. I have always been impressed by the high level of accuracy and research involved in this newsletter which I believe gives good coverage of malpractice toward primates . . .
>
> In my personal dealings with Dr. McGreal, I have the highest regard for her dedication and honesty.

Earl B. Baysinger, Chief of the Federal Wildlife Permit Office, United States Department of Interior's Fish and Wildlife Service (A3939, A 3947-48)

> I have known Dr. Shirley McGreal professionally and casually personally for over 15 years. . . . I have found Dr. McGreal and the IPPL to be consistent sources of reliable information of significant value to me and my various offices in carrying out our legally mandated tasks or ensuring the continued survival of all species of wild fauna and flora, including nonhuman primates. . . .
>
> I have never known her deliberately to spread false information nor to engage in what could be considered malicious or libelous acts. While she frequently uses descriptive adjectives and adverbs and has a tendency to vigorously

pursue her points to the chagrin of those who would prefer the points to remain unpursued, I have never found her to go beyond the point of reasonable enquiry.

Dr. Richard Mitchell, Staff Zoologist in the Office of the Scientific Authority under CITES for the United States Fish and Wildlife Service (A3969, A 3971-72):

I have known Dr. Shirley McGreal since 1979 and have exchanged numerous phone calls, letters, and information relating to trade in endangered species of wildlife and the conservation of primates. Shirley has always maintained herself in the utmost professional manner with the interest of the resource foremost. . .

I depend heavily on information furnished by Dr. McGreal to insure that no illegal primates are imported into the United States in violations of CITES and the laws of foreign Nations. My office's scientific findings are documented and are subject to scrutiny by the public. Therefore, I have to be certain beyond doubt that the information that I base my decisions on is accurate and can withstand any legal scrutiny.

I will continue to depend on the confidential information that is provided by Dr. McGreal and the IPPL in order to regulate the trade in endangered species of primates and other wildlife. . . .

Clark R. Bavin, Chief of the Division of Law Enforcement, United States Department of the Interior's Fish and Wildlife Service (A3967-68):

Through the years I have consistently found Ms. McGreal to be a sincere, honest, and an energetic advocate of the cause of primate protection and a valuable source of information to the Service about the activities of persons engaged in both the legal and illegal trafficking of primates. At no time have I ever had cause to believe that Ms. McGreal was providing information that she did not believe to be true and factual.

D. *Letter to the Editor by Dr. Andrew Rowan (A 2512).*

J. Med. Primatol. 13:173 (1984)

Letter to the Editor:

In his letter of March 14, 1984, Dr. Alfred Prince questions the IMMUNO A.G. company's proposal to obtain 60-80 chimpanzees annually from the wild for a proposed hepatitis research center in Sierra Leone. Dr. Prince is correct to raise such concerns, since the indications are that Sierra Leone has only a small native chimpanzee population, that most or all of the wild animals procured for the laboratory are likely to come from neighboring countries, that the West African chimpanzee population is declining at an alarming rate, and that the methods used to capture animals are very wasteful and inhumane.

Dr. Prince also suggests that hepatitis studies should be done on chimpanzees that are already captive or that are bred in captivity. But his own laboratory (Vilab II) in Liberia uses (or accepts ) wild-caught chimpanzees as a source of animals for their studies. Furthermore, the Vilab proposals for rehabilitating chimpanzees are not much more realistic than the IMMUNO suggestions. Janice Carter and Stella Brewer have shown how difficult it is to return chimpanzees to the wild successfully, even with constant support and monitoring. Dr. Prince provides no data to suggest that he has found a way to overcome the problems.

Establishing a laboratory in a country where chimpanzees are (or were?) found naturally, as a ploy to avoid the barriers against trade in endangered species, is not an ethical or responsible approach to either conservation or research using chimpanzees.

Andrew N. Rowan, PH.D.
Tufts University School of
Veterinary Medicine
Boston, MA

E. *Excerpt of Dr. Alfred Prince's Deposition (A 1090).*

Q. Do you agree that there is no controversy about an alleged point, that you can exclude the possibility of a carrier state for Non-A, Non-B hepatitis in chimpanzees?

MR. FERSKO: Objection as to form.

A. I think that everyone who is involved in research in Non-A, Non-B with chimps would agree that you cannot exclude whether the animal is infected.

A. I don't think it is controversial among those who work in the area. . . .

F. *Excerpt of Dr. Jan Moor-Jankowski's Deposition (A 46-48).*

Q. Did you have an understanding that what he [Sitter] was doing was good practice in terms of the way he was capturing chimpanzees up until these people that you say were reliable told you something different?

A. I have to divide it in two points.

Q. Go ahead.

A. I initially was not concerned how the animals were captured. The whole biomedical community was really not very much aware of the animal welfare issue, as you can follow up through the legislation.

I became attuned to it by working with these animals and beginning in 1978 I was getting more and more reports that the methods described by Dr. Sitter do not work.

When Dr. Prince established his laboratory he told me that he would be using the methods by Dr. Sitter, recommended by Dr. Sitter. Actually, he said that he was establishing the operation in Liberia for humanitarian reasons, as reflected on some letters which you have. I was repeating his position, to get animals which were not obtained by killing mothers. He was speaking of setting traps, of shooting the animals with tranquilizer guns. I was skeptical of the tranquilizer guns because I sent three expeditions and they were not able to catch the animals that way. But I thought maybe he had some special method. He was speaking of a South African method. I then found out that it didn't work for Dr. Prince that way, that he had to purchase the animals from native hunters.

Q. When, if ever, did you come to an understanding—

A. Can you repeat the beginning.

Q. When, if ever, did you come to an understanding that Dr. Sitter's capture methods were in any respect other than what Dr. Sitter had been telling you?

A. I think in 1981 and 1982. I don't recall the exact time but around that time.

Q. What did you learn in this period 1981, 1982, that led you to believe that Dr. Sitter's capture methods were not the way he was telling you?

A. The most signal— there were many, but the most signal was a publication by Dr. Prince, who has been many times in Sierra Leone and Liberia, in which he states that the only method or the most prevalent, or the only method, I think he said, of capturing the animals is killing the mothers in Sierra Leone and in Liberia, and for each baby caught, five to ten mothers are killed.

This has been published by the National Institute of Health, in a symposium which was a considerable event devoted to this program, and it was very authoritative.

. . . .

Q. Is there anyone other than Dr. Prince who has given you information which has caused you to disbelieve Dr. Sitter's rendition of his own trapping methods?

A. Yes. Dr. Prince's report really put together all that I was hearing over the years, beginning with my own people who went to Sierra Leone, the reports of Dr. McGrew, Vernon Reynolds, Kortlandt, Harrison, Teleki, to name only a few.

G. *Excerpt of Dr. Jan Moor-Jankowski's Deposition (A 253-54).*

Q. In 1979, when the NIH animals were taken, were you able to ascertain which animals that had been exposed to N-A, N-B research were carriers?

A. Yes.

Q. Was it your understanding that in 1979 that you could determine whether or not a chimpanzee that had been exposed to N-A, N-B could be infectious?

A. The animals were – for the situation in man, they were considered infectious by NIH. It was infectious animals.

MR. FERSKO: I ask that my question be read back and I would ask if we could focus on the question.

(Question read)

A. That I could determine?

Q. Yes.

A. I knew, I could not determine, but I knew on the basis of history, and in several animals of the enzyme situation, and what investigators told me.

Q. In other words, you were able to determine that some animals, based on their histories and based on the enzyme levels –

A. And the program.

Q. -[1] that some animals that had been exposed to N-A, N-B were not carriers at that point in time and [2] some that were exposed to N-A, N-B were carriers at that point in time?

A. The second part of your statement, not the first.

H. *Excerpt of Dr. Jan Moor-Jankowski's Deposition (A 114-16, 124, 208, 214-15).*

Q. Doctor, did you get any facts during the course of 1983, before you published the article, that led you to believe that maybe what you were publishing in that letter to the editor was not factually correct?

A. Not at all.

Q. Doctor, how about when you got those minutes that we showed you this morning, was there anything in there that led you to believe that maybe what you had wasn't factually correct?

A. I said before it is not, not at all.

. . . .

Q. Doctor, did you receive any information in 1983 that led you to believe that Immuno doesn't want to take 60 to 80 chimpanzee out of the wild but wants to have 50 to 60 chimpanzees to start a breeding colony? Did you see any information like that during the course of the year before you published it?

. . . .

A. I did not receive anything which would contradict what was in Dr. McGreal's letter.

. . . .

Q. Did you consider the fact that you had received a document that said they were going to do breeding and not take 60 to 80 chimpanzees a year from the wild?

A. What is said here on the basis of what I know they could have as well said that they will go to the bakery and they will bake them, new chimpanzees, once a week as much as they need them.

You cannot establish a breeding colony and breed the animals. It takes at least eight years to have a breeding with the animals which you can catch.

. . . .

Q. Since you were trying to give a truthful and complete picture in publishing Shirley McGreal's letter to the editor, don't you think that maybe you should have explained that there were also these minutes that we saw, and that there was also this Bundu letter?

Don't you think that casts a little different light on the project?

A. It doesn't cast a different light on the project to me.

. . . .

Q. The fact is, though, you didn't mention [proposed captive breeding] and don't you think it would have been appropriate to even mention it in that context, even if you wanted to be critical of it?

. . . .

A. I am being all the time told that I wrote the letter. I did not write the letter. The letter by Dr. Shirley McGreal stood as it was and the second wave documents, which wasn't even authenticated by stationery, which did not go with another letter, and even in its text in no way, in my experience, contradicted the first.

. . . .

Q. Did you think that in order to give a true picture of what was going on with respect to the Immuno Sierra Leone project to the readers of the Journal of Medical Primatology, that it would be

appropriate to give them the benefit of the amplification you had received prior to the time of its publication?

. . . .

A. The most important aspect of the situation was that Immuno refused to answer a straightforward question, a letter which I submitted, is true or false, and threatened with lawyers.

This was to me a situation which I just felt I should submit to the readers.

Here something was written. There is a letter which I received. It was not directly rebutted by Immuno but lawyers wrote to me letters in legalese, the essence of which I reproduced in the Journal.

This was my response as the Journal's editor, as I saw it.

I. *Excerpt of Dr. Gerard Eder's Deposition (SA 8-9).*

Q. Doctor, yesterday we talked a lot about your visit to Sierra Leone in April of 1983.

When you returned to Vienna and to Immuno after that visit, were there any decisions made at Immuno concerning the Sierra Leone project?

A. The only decision which we have made when I returned and reported to Dr. Eibl was to apply for an importation of 20 chimpanzees from Sierra Leone.

. . . .

Q. Did there come a time thereafter when Immuno did make a decision on some aspect or the other of the project?

MR. FERSKO: Objection as to form. You can answer.

A. I don't know how many times I have to answer that question again.

It is not made a decision until now, because all these negotiations never were finished.

If you finished a negotiation, you can make a decision. But until now it wasn't made.

I am not the decision-maker in our company. Decisions are made by Dr. Eibl. I only can propose it.

J. *Excerpt of Dr. Johann Eibl's Deposition (A 1506-08).*

Q. With respect to the substance of what the [New Scientist] article [in October 1983] alleges Mr. Teleki wrote, that the starting population of fifty to sixty chimps—that Immuno contemplated a starting population of fifty to sixty chimps; is that true or false?

A. No. It is, insofar not fully true, because I always mention 60 to 80 more. So you could not say it is false.

Q. It errs on the side of too low?

A. Right.

It is on the lower side.

. . . .

Q. Had Immuno claimed that it would be in full production [breeding] within two to three years?

A. No, because what we claimed was that we want to have sixty to eighty chimpanzees for the first year, and this was mainly for tests and not for breeding purposes. So, I mean, insofar as a statement of Teleki, it does not mean anything. But I mean just to cite it. Why not?

Q. Was Immuno plānning to get more chimps in the years following the first year?

A. Right. Right.

Q. How was it planning to obtain those additional chimps?

A. In the same way as obtaining these sixty to eighty chimps, provided that this way would work.

. . . .

Q. So, Immuno was not contemplating breeding the chimpanzees in Sierra Leone at that time?

A. No. I mean the idea was not to start out with the breeding colonies. The idea was for the immediate use, to have chimps available, and then if all these tests are carried out, we would have then three options.

The first option is to use them for a breeding colony.

The second option then was to release them to a park, to an animal park.

The third option was to release them to the wild.

Q. To the wild?

A. Yes, sir.

Q. Immuno was contemplating all three of those options?

A. Certainly.

. . . .

Q. At this point in time had Immuno decided which of the options it was going to adopt?

A. No, but I think all three options are running to a certain extent parallel. . . .

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No. 90-1579

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1990

IMMUNO, A.G.,

*Petitioner,*

vs.

JAN MOOR-JANKOWSKI,

*Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

## REPLY MEMORANDUM FOR PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI
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## Reply Memorandum For The Petitioner

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Respondent has raised three new arguments:

- The Court of Appeals did not rely on *Philadelphia Newspapers v. Hepps*, 475 U.S. 767, 106 S. Ct.

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[1]Respondent's brief alters the caption by adding "Dr." before his name.

1558, 89 L. Ed. 2d 783 (1986).

- Independent review by this Court is not permissible because the libel *plaintiff* is appealing.

- *Michigan v. Long*, 463 U.S.1032, 103 S. Ct. 3469, 77 L. Ed. 2d 789 (1974), insulates the state court decision from this Court's review based on an incantation of "independent state grounds" at odds with the actual foundation of the decision's reasoning.

Respondent's brief itself shows why the application of *Hepps*, at the summary judgment stage, needs to be clarified: faced with Immuno's legal argument for certiorari, Moor-Jankowski argues facts but denies that this Court should review those facts. As his defense against falsity he pretends not to believe that Immuno would employ an infectiousness test that both he and researchers at Immuno knew about. The appellate courts below turned that into an excuse for foreclosing a jury from trying the issue of falsity—using Moor-Jankowski's dubious "belief" that the test was "impractical" to foreclose a trial of an objective—and material—issue of fact.

Moor-Jankowski argues that the *Hepps* burden played no role in the "state grounds" part of Judge Kaye's decision, but *Hepps* and only *Hepps* was the authority for the Court below requiring the plaintiff to prove falsity.

There is certainly no doubt that the court below recited the incantation which *Michigan v. Long* suggests; but that cannot alter the fact that the analysis itself turns on *Hepps*, which is federal law. The Court of Appeals adopted the findings of the Appellate Division (Pet. App. A-10). The Appellate Division said that the burden on Immuno to prove falsity was constitutionally mandated by *Hepps* (Pet. App. A-69). The Court of Appeals never wavered from that

position. It cited *Hepps* and also referred to two New York cases. However, neither of the state cases cited establishes the burden on plaintiff for proving falsity *under New York law.*[2]

This Court should grant certiorari to clarify the application of *Hepps* on a motion for summary judgment. The Appellate Division held that the charge that Immuno made a proposal that could result in the spread of hepatitis (*see, e.g.*, headline to Editorial Note, Pet. App. A-149) was true, based on that court's subjective determination (adopted by the Court of Appeals without comment) that Immuno would not employ the test to determine infectiousness, even though the record evidence is that such a test existed and Immuno always said it would employ such a test. Moor-Jankowski charged that Immuno submitted a proposal which on its face and of necessity would potentially spread Non-A/Non-B hepatitis in West Africa.[3] It is that fundamental misapplication of *Hepps*, and the concomitant need for a refinement of the *Michigan v. Long* doctrine, which brings Immuno back again to this Court for a determination of what plaintiff's burden is, under *Hepps*, at this stage.

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[2]*Steinhilber v. Alphonse*, 68 N.Y.2d 283, 508 N.Y.S.2d 901, 501 N.E.2d 550 (1986) (opinion vs. fact case); *Silsdorf v. Levine*, 59 N.Y.2d 8, 462 N.Y.S.2d 822, 449 N.E.2d 716, *cert. denied*, 464 U.S. 831, 104 S. Ct. 109, 78 L. Ed. 2d 111 (1983) (held that if a plaintiff alleged falsity of the underlying facts, the opinion privilege did not attach on a motion to dismiss).

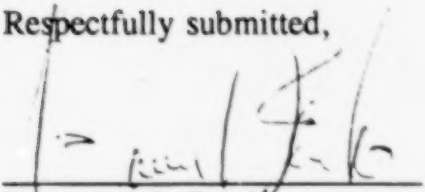
[3]The very headline Moor-Jankowski wrote for his own Editorial Note charged Immuno with "a project with potential to spread Non-A, Non-B hepatitis in West Africa." As pointed out in the Petition (Pet. pp. 20-21), and in the oral argument below (Pet. App. A-101-A-103), it was the falsity of *that* charge which caused Immuno to bring this suit. Disingenuously, Moor-Jankowski omits *his* headline for the Editorial Note from what he carefully claims to be the "entire text" of the alleged libel. Ans. Brf., p. 2.

Moor-Jankowski also says this court cannot review because it must defer to a state-court determination of the facts (Ans. Br. p. 16). But this Court decided in *Bose Corp. v. Consumers' Union of U.S., Inc.*, 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984), that First Amendment issues require an *independent appellate review of the whole record*. Moor-Jankowski deals with that apparent contradiction by saying that under *Bose* this Court may search the record only for defendants; that this Court may not search the record if a plaintiff complains of a lower court's subjective determination as to falsity. If that is the law then *Bose* means that only defendants can have effective appellate review on the falsity issue. This Court should grant certiorari for the additional purpose of deciding whether or not *Bose* is for defendants only.

## *Conclusion*

Petitioner Immuno, AG therefore respectfully requests that this Court grant its petition to consider the important questions presented and to correct a serious injustice which has precluded it from having its defamation case heard on the merits.

Respectfully submitted,



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